

ITEM ____
TEST CLAIM
DRAFT STAFF ANALYSIS

Penal Code Sections 273a, 11164, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5,
11165.6, 11165.7, 11165.9, 11165.14, 11166, 11166.5, 11168, and 11174.3,
Including Former Penal Code Sections 11161.5, 11161.6, 11161.7

Statutes 1975, Chapter 226
Statutes 1976, Chapters 242 and 1139
Statutes 1977, Chapter 958
Statutes 1978, Chapter 136
Statutes 1979, Chapter 373
Statutes 1980, Chapters 855, 1071 and 1117
Statutes 1981, Chapters 29 and 435
Statutes 1982, Chapter 905
Statutes 1984, Chapters 1170, 1391, 1423, 1613, and 1718
Statutes 1985, Chapters 189, 464, 1068, 1420, 1528, 1572 and 1598
Statutes 1986, Chapters 248 and 1289
Statutes 1987, Chapters 640, 1020, 1418, 1444 and 1459
Statutes 1988, Chapters 39, 269 and 1580
Statutes 1990, Chapters 931 and 1603
Statutes 1991, Chapters 132 and 1102
Statutes 1992, Chapter 459
Statutes 1993, Chapters 346, 510 and 1253
Statutes 1994, Chapter 1263
Statutes 1996, Chapters 1080, 1081 and 1090
Statutes 1997, Chapters 83 and 134
Statutes 1998, Chapter 311
Statutes 2000, Chapters 287 and 916
Statutes 2001, Chapters 133 and 754

Child Abuse and Neglect Reporting
(01-TC-21)

San Bernardino Community College District, Claimant

EXECUTIVE SUMMARY

Background

San Bernardino Community College District filed a test claim on June 28, 2002, alleging that amendments to child abuse reporting statutes since January 1, 1975, have resulted in reimbursable increased costs mandated by the state. A declaration of costs incurred was also submitted by the San Jose Unified School District. A number of changes to the law have occurred, particularly with a reenactment in 1980, and substantive amendments in 1997 and 2000. Claimant alleges that all of these changes have imposed a reimbursable state-mandated program on school districts.

The Department of Finance and the Department of Social Services (DSS) both oppose the test claim, largely on procedural grounds. DSS also challenges the claim on several substantive points, particularly arguing that many of the provisions claimed do not in fact mandate that new duties be performed by school districts.

Staff finds that while many of the test claim statutes do not impose mandatory new duties on school districts, there are some new activities alleged that are not required by prior law, thus mandating a new program or higher level of service, as described below.

Conclusion

Staff concludes that Penal Code sections 11165.7 and 11174.3, as added or amended by Statutes 1987, chapters 640 and 1459, Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 1998, chapter 311, Statutes 2000, chapter 916, and Statutes 2001, chapters 133 and 754; mandate new programs or higher levels of service for school districts 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, for the following specific new activities for K-12 school districts:

- Reporting to the State Department of Education the reasons why training is not provided, whenever school districts do not train their employees specified in Penal Code section 11165.7, subdivision (a), in the duties of mandated reporters under the child abuse reporting laws. (Pen. Code, § 11165.7, subd. (d).)
- Informing a selected member of the staff of the following requirements prior to the interview whenever a suspected victim of child abuse or neglect is to be interviewed during school hours, on school premises, and has requested that a staff member of the school be present at the interview:

The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Penal Code section 11167.5. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. (Pen. Code, § 11174.3, subd. (a).)

Staff concludes that any test claim statutes, executive orders and allegations not specifically approved above, do not mandate a new program or higher level of service, or impose costs mandated by the state under article XIII B, section 6.

Staff Recommendation

Staff recommends the Commission adopt this staff analysis to partially approve this test claim.

STAFF ANALYSIS

Claimant

San Bernardino Community College District

Chronology

- 06/28/02 Claimant files the test claim with the Commission on State Mandates (Commission)
- 07/08/02 Commission staff issues the completeness review letter and requests comments from state agencies
- 08/02/02 Department of Finance (DOF) requests an extension of time for filing comments for 120 days, to consult with the Office of the Attorney General
- 08/05/02 Commission staff grants a 90-day extension to November 5, 2002
- 08/08/02 Department of Social Services (DSS) requests an extension of time to November 26, 2002
- 08/12/02 Commission staff grants the extension of time as requested
- 10/21/02 DOF files letter confirming that they also have an extension of time to file comments until November 26, 2002
- 11/25/02 DSS files comments on the test claim
- 11/26/02 DOF files comments on the test claim
- 12/26/02 Claimant files rebuttal to comments by DOF
- 12/31/02 Commission staff issues a request to the claimant for a response to the state agency comments
- 01/17/03 Claimant submits response to the Commission's request, responding to the DSS comments and referring to earlier response to DOF's comments
- 09/12/07 Commission staff requests comments from the California Community Colleges
- 10/17/07 Commission staff issues the draft staff analysis on the test claim

Background

This test claim alleges that amendments to California's mandatory child abuse reporting laws impose a reimbursable state-mandated program on schools districts. A separate test claim, *Interagency Child Abuse and Neglect Investigation Reports (00-TC-22)*, was filed by the County of Los Angeles on behalf of local agencies on many of the same statutes. The two test claims present a number of separate issues of law and fact and were not consolidated.

A child abuse reporting law was first added to the Penal Code in 1963, and initially required medical professionals to report suspected child abuse to local law enforcement or child welfare authorities. The law was regularly expanded to include more professions required to report suspected child abuse (now termed "mandated reporters"), and in 1980, California reenacted and substantively amended the law, entitling it the "Child Abuse and Neglect Reporting Act," or "CANRA."

The Court in *Stecks v. Young* (1995) 38 Cal.App.4th 365, 370-371, provides an overview of the Child Abuse and Neglect Reporting Act, following the 1980 reenactment at Penal Code section 11164 et seq.:

For more than 30 years, California has used mandatory reporting obligations as a way to identify and protect child abuse victims. In 1963, the Legislature passed former section 11161.5, its first attempt at imposing upon physicians and surgeons the obligation to report suspected child abuse. Although this initial version and later ones carried the risk of criminal sanctions for noncompliance, the state Department of Justice estimated in November 1978 that only about 10 percent of all cases of child abuse were being reported. (*Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1216-1217 [242 Cal.Rptr. 312].)

Faced with this reality and a growing population of abused children, in 1980 the Legislature enacted the Child Abuse Reporting Law (§ 11165 et seq.), a comprehensive scheme of reporting requirements “aimed at increasing the likelihood that child abuse victims are identified.” (*James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 254 [21 Cal.Rptr.2d 169], citing *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 90 [270 Cal.Rptr. 379].) The Legislature subsequently renamed the law the Child Abuse and Neglect Reporting Act (Act) (§ 11164). (Stats. 1987, ch. 1444, § 1.5, p. 5369.)

These statutes, all of which reflect the state’s compelling interest in preventing child abuse, are premised on the belief that reporting suspected abuse is fundamental to protecting children. The objective has been to identify victims, bring them to the attention of the authorities, and, where warranted, permit intervention. (*James W. v. Superior Court, supra*, 17 Cal.App.4th at pp. 253-254.)

Claimant’s Position

San Bernardino Community College District’s June 28, 2002¹ test claim filing alleges that amendments to child abuse reporting statutes since January 1, 1975, have resulted in reimbursable increased costs mandated by the state. The test claim narrative and declarations allege new activities for school districts, county offices of education, and community college districts, as follows:²

- Mandated reporting of known or suspected child abuse to a police or sheriff’s department, or to the county welfare department, as soon as practicable by telephone, and in writing within 36 hours. (Pen. Code, §§ 11165.9 and 11166, subd. (a).) “All mandated reporters are further compelled to report incidents of child abuse or neglect by the fact that failure to do so is a misdemeanor, pursuant to Penal Code Section 11166, Subdivision (b).”
- Mandated reports “are required to be made on forms adopted by the Department of Justice” (Pen. Code, § 11168.)

¹ The potential reimbursement period begins no earlier than July 1, 2000, based upon the filing date for this test claim. (Gov. Code, § 17557.)

² Test Claim Filing, pages 122-124.

- “To assist and cooperate with law enforcement agencies investigating alleged complaints of child abuse or neglect committed at a school site.” (Pen. Code, § 11165.14.)
- “To notify the staff member selected, and for that selected staff member to be present at an interview of a suspected victim when the child so requests.” (Pen. Code, § 11174.3.)
- “To either train its mandated reporters in child abuse or neglect detection and their reporting requirements; or, to file a report with the State Board of Education stating the reasons why this training is not provided.” (Pen. Code, § 11165.7, subd. (d).)
- “When training their mandated reporters in child abuse or neglect reporting, to supply those trainees with a written copy of their reporting requirements and a written disclosure of their confidentiality rights.” (Pen. Code, § 11165.7, subd. (c).)
- “To obtain signed statements from its mandated reporters, on district forms, prior to commencing employment with the district, and as a prerequisite to that employment, to the effect that he or she has knowledge of his or her child abuse and neglect reporting requirements and their agreement to perform those duties.” (Pen. Code, § 11166.5.)

The filing includes a declaration from the San Bernardino Community College District Chair of Child Development and Family and Consumer Science, and a declaration from the San Jose Unified School District, Director of Student Services, stating that each of the districts have incurred unreimbursed costs for the above activities.

The claimant rebutted the state agency comments on the test claim filing in separate letters dated December 19, 2002 (responding to DOF), and January 17, 2003 (responding to DSS). The claimant’s substantive arguments will be addressed in the analysis below.³

Department of Finance Position

In comments filed November 26, 2002, DOF alleges the test claim does not meet basic test claim filing standards, and “requests that the Commission reject the claim for failure to comply with

³ In the December 19, 2002 rebuttal, the claimant argues that the state DOF comments are “incompetent” and should be stricken from the record since they do not comply with the Commission’s regulations (Cal. Code Regs, tit. 2, § 1183.02, subd. (d).) That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative’s personal knowledge, information, or belief. The claimant contends that “DOF’s comments do not comply with this essential requirement.”

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109). Thus, factual allegations raised by a party regarding how a program is implemented are not relied upon by staff at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The state agency responses contain comments on whether the Commission should approve this test claim and are, therefore, not stricken from the administrative record.

the specificity requirement in 2 CCR section 1183(e).” Further, DOF argues that the claim should be denied, because:

[T]he District fails to point to any provision of law or regulation that defines a community college district as a mandated reporter within the meaning of Penal Code section 11165.7. While several versions of this section mention teachers and various school district employees, none of the enactments of this section include employees of community college districts in the definition of mandated reporter. While community colleges are part of the public school system, community college districts are legal entities separate and distinct from school districts. (Education Code §§ 66700, 68012.) ...

As a final matter, the Department moves to strike the declaration of ... Director of Student Services at the San Jose Unified School District [because the statements] do not authenticate the factual assertions made by the claimant, as required by 2 CCR section 1183(e)(4). The declaration is therefore irrelevant to the mandate claim submitted by the San Bernardino Community College District.

Department of Social Services Position

DSS’s comments on the test claim filing, submitted November 25, 2002, also argue that the test claim as submitted fails “to set forth clearly and precisely which specific statutory provisions, enacted on or after 1975, imposed new mandates on local government, as required by Title 2, California Code of Regulations (CCR), section 1183(e).”

DSS also challenges the claim on several substantive points including: arguing that Penal Code section 11165.14 does not impose a duty on its face to cooperate and assist law enforcement agencies, as pled; and the duty of a staff member to be present at the interview of a suspected victim, upon request, pursuant to Penal Code section 11174.3, is voluntary which “negates the mandate claim.” In addition, DSS asserts that the training of mandated reporters “is optional, and can be avoided if it reports to the State Department of Education why such training was not provided [and] the report can be transmitted orally or electronically, at no or de minimis cost to Claimant.”

Discussion

The courts have found that article XIII B, section 6, of the California Constitution⁴ recognizes the state constitutional restrictions on the powers of local government to tax and spend.⁵ “Its

⁴ Article XIII B, section 6, subdivision (a), provides: (a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

⁵ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

purpose 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."⁶ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.⁷ In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.⁸

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.⁹ To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.¹⁰ A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."¹¹

Finally, the newly required activity or increased level of service must impose costs mandated by the state.¹²

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 6.¹³ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."¹⁴

⁶ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

⁷ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

⁸ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.*); *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 (*Lucia Mar*).

⁹ *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; see also *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.)

¹⁰ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

¹¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

¹² *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 (*County of Sonoma*); Government Code sections 17514 and 17556.

¹³ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

¹⁴ *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.

Issue 1: Does the Commission have jurisdiction over the test claim pleadings and the community college district as a party to the test claim?

(A) Sufficiency of the Test Claim Pleadings

As a preliminary matter, DSS and DOF challenged the sufficiency of the test claim pleadings in comments filed November 25 and 26, 2002, respectively.

Government Code section 17551 requires the Commission to hear and decide upon a claim by a local agency or school district that the claimant is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Government Code section 17521 defines the test claim as the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Thus, the Government Code gives the Commission jurisdiction only over those statutes or executive orders pled by the claimant in the test claim. At the time of the test claim filing on June 28, 2002, section 1183, subdivision (e), of the Commission regulations required the following content for an acceptable filing:¹⁵

All test claims, or amendments thereto, shall be filed on a form provided by the commission [and] shall contain at least the following elements and documents:

- (1) A copy of the statute or executive order alleged to contain or impact the mandate. The specific sections of chaptered bill or executive order alleged must be identified.

The regulation also required copies of all “relevant portions of” law and “[t]he specific chapters articles sections, or page numbers must be identified,” as well as a detailed narrative describing the prior law and the new program or higher level of service alleged. Staff finds that the Commission has jurisdiction over the statutes and code sections listed on the test claim title page and described in the narrative, and each will be analyzed below for the imposition of a reimbursable state mandated program.

(B) Community College District as a Party to the Test Claim

DOF also raised the issue that the claimant, as a community college district, is not a proper party to the claim because “[w]hile several versions of this section mention teachers and various school district employees, none of the enactments of this section include employees of community college districts in the definition of mandated reporter. While community colleges are part of the public school system, community college districts are legal entities separate and distinct from school districts. (Education Code §§ 66700, 68012.)”

Staff finds that the term “teachers,” as used in the Child Abuse and Neglect Reporting Act, is inclusive of community college district teachers. The term is deliberately broad as it is used in the statutory list of mandatory child abuse reporters. That list is currently found at Penal Code section 11165.7, and begins:

- (a) As used in this article, “mandated reporter” is defined as any of the following:
 - (1) A teacher.
 - (2) An instructional aide.
 - (3) A teacher’s aide or teacher's assistant employed by any public or private

¹⁵ The required contents of a test claim are now codified at Government Code section 17553.

school.

(4) A classified employee of any public school.

(5) An administrative officer or supervisor of child welfare and attendance, or a certificated pupil personnel employee of any public or private school. ...

An Attorney General Opinion (72 Ops.Cal.Atty.Gen. 216 (1989)) analyzed the wording of earlier versions of the statutory scheme to find that a ballet teacher at a post-secondary private school in San Francisco was included in the meaning of the word “teacher,” as used in CANRA, when the school admitted students as young as eight years old.¹⁶ The opinion goes into great detail using statutory construction to deduce the legislative meaning of the word “teacher” in this context. Finding that the word “teacher” is now singled out in the statute without any qualification, the opinion reaches the following conclusion:

Without intending to suggest that the meaning of the word “teacher” as found in the Act is without bounds and mandates a reporting duty on any person who happens to impart some knowledge or skill to a child, we do not accept the proffered limitation that it applies only to teachers in K-12 schools. We find nothing in the statutory language of the Child Abuse and Neglect Reporting Act to support such a limitation on the plain meaning of the word “teacher”.

¶ ... ¶

The Child Abuse and Neglect Reporting Act imposes a duty on “teachers” to report instances of child abuse that they come to know about or suspect in the course of their professional contact in order that child protective agencies might take appropriate action to protect the children. We are constrained to interpret the language of the Act according to the ordinary meaning of its terms to effect that purpose. Doing so, we conclude that a person who teaches ballet at a private ballet school is a “teacher” and thus a “child care custodian” as defined by the Act, and therefore has a mandatory duty to report instances of child abuse under it.

The term “teacher” is applied to community college instructors elsewhere in the Penal Code, and in case law.¹⁷ CANRA is aimed at the protection of individuals under the age of 18 from child abuse and neglect;¹⁸ therefore it is significant that community colleges are required to serve some students under 18 years old. Education Code section 76000 provides that “a community college district shall admit to the community college any California resident ... possessing a high school diploma or the equivalent thereof.” Education Code section 48412 requires that the proficiency exams be offered to any students “16 years of age or older,” who has or will have completed 10th grade, and “shall award a “certificate of proficiency” to persons who demonstrate that

¹⁶ “An opinion of the Attorney General “is not a mere ‘advisory’ opinion, but a statement which, although not binding on the judiciary, must be ‘regarded as having a quasi judicial character and [is] entitled to great respect,’ and given great weight by the courts.” (*Community Redevelopment Agency of City of Los Angeles v. County of Los Angeles* (2001) 89 Cal.App.4th 719, 727.)

¹⁷ For examples, see Penal Code section 291.5 and *Compton Community College etc. Teachers v. Compton Community College Dist.* (1985) 165 Cal.App.3d 82.

¹⁸ Penal Code sections 11164 and 11165.

proficiency. The certificate shall be equivalent to a high school diploma.” Thus 16 and 17 year olds can be regular students at community colleges.

Therefore, staff finds that the Commission has jurisdiction to decide a test claim filed by a community college district, as some of the claimed activities apply to employers of mandated reporters, including teachers. However, the issue of community college districts being “school districts” within the meaning of CANRA is more complex, and will be analyzed as the term appears in the test claim statutes below.

Issue 2: Do the test claim statutes mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute or executive order mandates a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required, or when legislation requires that costs previously borne by the state are now to be paid by school districts.¹⁹ Thus, in order for a test claim statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must order or command that school districts perform an activity or task.

The test claim allegations will be analyzed by areas of activities, as follows: (a) mandated reporting of child abuse and neglect; (b) training mandated reporters; (c) investigation of suspected child abuse involving a school site or a school employee; (d) employee records. The prior law in each area will be identified.

(A) Mandated Reporting of Child Abuse and Neglect

Penal Code Section 11164:

The test claim pleadings include Penal Code section 11164.²⁰ Subdivision (a) states that the title of the article is the “Child Abuse and Neglect Reporting Act,” and subdivision (b) provides that “[t]he intent and purpose of this article is to protect children from abuse and neglect. In any investigation of suspected child abuse or neglect, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim.”

A recent published decision in the 1st District Court of Appeals, *Jacqueline T.*, examined Penal Code section 11164 and found “the statute imposed no mandatory duty on County or Employees. Rather, the statute merely stated the Legislature’s “intent and purpose” in enacting CANRA, an article composed of over 30 separate statutes.”²¹ In reaching this conclusion, the court relied on reasoning from *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 639 [Terrell R.]:

¹⁹ *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 836.

²⁰ Added by Statutes 1987, chapter 1459; amended by Statutes 2000, chapter 916.

²¹ *Jacqueline T. v. Alameda County Child Protective Services* (Sept. 20, 2007, A116420) ___ Cal.App.4th ___ [p. 14]. Although the official cite is not yet available, California Rules of Court, rule 8.1115(d) states: “A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.”

An enactment creates a mandatory duty if it requires a public agency to take a particular action. (*Wilson v. County of San Diego, supra*, 91 Cal.App.4th at p. 980.) An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion. (*Ibid.*) The use of the word "shall" in an enactment does not necessarily create a mandatory duty. (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 910-911, fn. 6 [136 Cal.Rptr. 251, 559 P.2d 606]; *Wilson v. County of San Diego, supra*, 91 Cal.App.4th at p. 980.)

Staff also finds this statement of law persuasive, and the *Jacqueline T.* court's legal finding on the nature of section 11164 as merely an expression of legislative intent is directly on point with the case at hand. Therefore, staff finds that Penal Code section 11164 does not mandate a new program or higher level of service on school districts.

Penal Code Sections 11165.9, 11166, and 11168, Including Former Penal Code Section 11161.7:

Penal Code section 11166,²² subdivision (a), as pled, provides that "a mandated reporter shall make a report to an agency specified in Section 11165.9 whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. The mandated reporter shall make a report to the agency immediately or as soon as is practicably possible by telephone and the mandated reporter shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident." Penal Code section 11165.9 requires reports be made "to any police department, sheriff's department, county probation department if designated by the county to receive mandated reports, or the county welfare department. It does not include a school district police or security department." Penal Code section 11168²³ (derived from former Pen. Code, § 11161.7)²⁴ requires the written reports to be made on forms "adopted by the Department of Justice."

Mandated child abuse reporting has been part of California law since 1963, when Penal Code section 11161.5 was first added. Former Penal Code section 11161.5, as amended by Statutes 1974, chapter 348, required specified medical professionals, public and private school officials

²² As added by Statutes 1980, chapter 1071; amended by Statutes 1981, chapter 435, Statutes 1982, chapter 905, Statutes 1984, chapter 1423, Statutes 1986, chapter 1289, Statutes 1987, chapter 1459, Statutes 1988, chapters 269 and 1580, Statutes 1990, chapter 1603, Statutes 1992, chapter 459, Statutes 1993, chapter 510, Statutes 1996, chapters 1080 and 1081, and Statutes 2000, chapter 916.

²³ As added by Statutes 1980, chapter 1071 and amended by Statutes 2000, chapter 916. Derived from former Penal Code section 11161.7, added by Statutes 1974, chapter 836, and amended by Statutes 1977, chapter 958.

²⁴ Penal Code section 11161.7 was added by Statutes 1974, chapter 836, and required DOJ to issue an optional form, for use by medical professionals to report suspected child abuse. Then, Statutes 1977, chapter 958, one of the test claim statutes, amended section 11161.7 and for the first time required a mandatory reporting form to be adopted by DOJ, to be distributed by county welfare departments.

and teachers, daycare workers, summer camp administrators, and social workers to report on observed non-accidental injuries or apparent sexual molestation, by making a report by telephone and in writing to local law enforcement and juvenile probation departments, or county welfare or health departments. The code section began:

(a) In any case in which a minor is brought to a physician and surgeon, dentist, resident, intern, podiatrist, chiropractor, or religious practitioner for diagnosis, examination or treatment, or is under his charge or care, or in any case in which a minor is observed by any registered nurse when in the employ of a public health agency, school, or school district and when no physician and surgeon, resident, or intern is present, by any superintendent, any supervisor of child welfare and attendance, or any certificated pupil personnel employee of any public or private school system or any principal of any public or private school, by any teacher of any public or private school, by any licensed day care worker, by an administrator of a public or private summer day camp or child care center, or by any social worker, and it appears to the [reporting party] from observation of the minor that the minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person, that the minor has been sexually molested, or that any injury prohibited by the terms of Section 273a has been inflicted upon the minor, he shall report such fact by telephone and in writing, within 36 hours, to both the local police authority having jurisdiction and to the juvenile probation department;²⁵ or in the alternative, either to the county welfare department, or to the county health department. The report shall state, if known, the name of the minor, his whereabouts and the character and extent of the injuries or molestation.

The list of "mandated reporters," as they are now called, has grown since 1975. The detailed list, now found at Penal Code section 11165.7,²⁶ includes all of the original reporters and now also includes teacher's aides and other classified school employees and many others.

Penal Code section 11166 also includes the following provision, criminalizing the failure of mandated reporters to report child abuse or neglect:²⁷

Any mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jail or by a fine of one thousand dollars (\$1,000) or by both that fine and punishment.

Article XIII B, section 6 does not require reimbursement for "[l]egislation defining a new crime or changing an existing definition of a crime."²⁸ Staff finds that reporting activities required of

²⁵ Subdivision (b) provided that reports that would otherwise be made to a county probation department are instead made to the county welfare department under specific circumstances.

²⁶ Added by Statutes 2000, chapter 916.

²⁷ This provision was moved to Penal Code section 11166 by Statutes 2000, chapter 916. Prior to that, the misdemeanor provision was found at section 11172, as added by Statutes 1980, chapter 1071.

²⁸ California Constitution, article XIII B, section 6, subdivision (a)(2).

mandated reporters, even when they are employees of a school district, are exempt from mandate reimbursement because failure to make an initial telephone report, followed by preparation and submission of a written report within 36 hours, on a form designated by the Department of Justice, subjects the mandated reporter to criminal liability. Therefore, staff finds that Penal Code sections 11165.9, 11166, and 11168, (including former Penal Code section 11161.7), do not mandate a new program or higher level of service on school districts for activities required of mandated reporters.

Definitions: Penal Code Sections 273a, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, and 11165.6:

The test claim alleges that all of the statutory definitions of abuse and neglect in the Child Abuse and Neglect Reporting Act result in a reimbursable state-mandated program.

Penal Code section 11165.6,²⁹ as pled, defines child abuse as “a physical injury that is inflicted by other than accidental means on a child by another person.” The code section also defines the term “child abuse or neglect” as including the statutory definitions of sexual abuse (§ 11165.1³⁰), neglect (§ 11165.2³¹), willful cruelty or unjustifiable punishment (§ 11165.3³²), unlawful corporal punishment or injury (§ 11165.4³³), and abuse or neglect in out-of-home care (§ 11165.5³⁴). The test claim also alleges the statute defining the term child (§ 11165³⁵).

While the definitional code sections alone do not require any activities, they do require analysis to determine if, in conjunction with any of the other test claim statutes, they mandate a new program or higher level of service by increasing the scope of required activities within the child abuse and neglect reporting program.

Penal Code section 11165 defines the word child as “a person under the age of 18 years.” This is consistent with prior law, which has defined child as “a person under the age of 18 years” since the child abuse reporting law was reenacted by Statutes 1980, chapter 1071. Prior to that time, mandated reporting laws used the term minor rather than child. Minor was not defined in the Penal Code, but rather during the applicable time the definition was found in the Civil Code, as

²⁹ As repealed and reenacted by Statutes 2000, chapter 916.

³⁰ Added by Statutes 1987, chapter 1459; amended by Statutes 1997, chapter 83 and Statutes 2000, chapter 287; derived from former Penal Code section 11165 and 11165.3.

³¹ Added by Statutes 1987, chapter 1459; derived from former Penal Code section 11165.

³² Added by Statutes 1987, chapter 1459.

³³ Added by Statutes 1987, chapter 1459; amended by Statutes 1988, chapter 39, and Statutes 1993, chapter 346.

³⁴ Added by Statutes 1987, chapter 1459; amended by Statutes 1988, chapter 39, Statutes 1993, chapter 346, and Statutes 2000, chapter 916. The cross-reference to section 11165.5 was removed from section 11165.6 by Statutes 2001, chapter 133.

³⁵ Added by Statutes 1987, chapter 1459; derived from former Penal Code section 11165.

“an individual who is under 18 years of age.”³⁶ Thus no substantive changes have occurred whenever the word child has been substituted for the word minor.

Former Penal Code section 11161.5 mandated child abuse reporting when “the minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person, that the minor has been sexually molested, or that any injury prohibited by the terms of Section 273a has been inflicted upon the minor.” The prior law of Penal Code section 273a³⁷ follows:

(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding 1 year, or in the state prison for not less than 1 year nor more than 10 years.

(2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

Staff finds that the definition of child abuse and neglect found in prior law was very broad, and required mandated child abuse reporting of physical and sexual abuse, as well as non-accidental acts by any person which could cause mental suffering or physical injury. Prior law also required mandated reporting of situations that injured the health or may endanger the health of the child, caused or permitted by any person.

Staff finds these sweeping descriptions of reportable child abuse and neglect under prior law encompass every part of the statutory definitions of child abuse and neglect, as pled.

Penal Code section 11165.1 provides that sexual abuse, for purposes of child abuse reporting, includes sexual assault or sexual exploitation, which are further defined. Sexual assault includes all criminal acts of sexual contact involving a minor, and sexual exploitation refers to matters depicting, or acts involving, a minor and “obscene sexual conduct.” Prior law required reporting of sexual molestation, as well as “unjustifiable physical pain or mental suffering.”

³⁶ Former Civil Code section 25; reenacted as Family Code section 6500 (Stats. 199, ch. 162, operative Jan. 1, 1994.)

³⁷ Added by Statutes 1905, chapter 568; amended by Statutes 1963, chapter 783, and Statutes 1965, chapter 697. The section has since had the criminal penalties amended by Statutes 1976, chapter 1139, Statutes 1980, chapter 1117, Statutes 1984, chapter 1423, Statutes 1993, chapter 1253, Statutes 1994, chapter 1263, Statutes 1996, chapter 1090, and Statutes 1997, chapter 134, as pled, but the description of the basic crime of child abuse and neglect remains good law.

Sexual molestation is not a defined term in the Penal Code. However, former Penal Code section 647a, now section 647.6, criminalizes actions of anyone “who annoys or *molests* any child under the age of 18.” In a case regularly cited to define “annoy or molest,” *People v. Carskaddon* (1957) 49 Cal.2d 423, 425-426, the California Supreme Court found that:

The primary purpose of the above statute is the ‘protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter.’ (*People v. Moore, supra*, 137 Cal.App.2d 197, 199; *People v. Pallares*, 112 Cal.App.2d Supp. 895, 900 [246 P.2d 173].) The words ‘annoy’ and ‘molest’ are synonymously used (Words and Phrases, perm. ed., vol. 27, ‘molest’); they generally refer to conduct designed ‘to disturb or irritate, esp. by continued or repeated acts’ or ‘to offend’ (Webster’s New Inter. Dict., 2d ed.); and as used in this statute, they ordinarily relate to ‘offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender.’ (*People v. Pallares, supra*, p. 901.) Ordinarily, the annoyance or molestation which is forbidden is ‘not concerned with the state of mind of the child’ but it is ‘the objectionable acts of defendant which constitute the offense,’ and if his conduct is ‘so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would ‘annoy or molest’ within the purview of’ the statute. (*People v. McNair*, 130 Cal.App.2d 696, 697-698 [279 P.2d 800].)

By use of the general term sexual molestation in prior law, rather than specifying sexual assault, incest, prostitution, or any of the numerous Penal Code provisions involving sexual crimes, the statute required mandated child abuse reporting whenever there was evidence of “offenses against children, [with] a connotation of abnormal sexual motivation.” Thus, sexual abuse was a reportable offense under prior law, as under the definition at Penal Code section 11165.1.

Penal Code section 11165.2 specifies that neglect, as used in the Child Abuse and Neglect Reporting Act, includes situations “where any person having care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered,” “including the intentional failure of the person having care or custody of a child to provide adequate food, clothing, shelter, or medical care.” Not providing adequate food, clothing, shelter, or medical care is tantamount to placing a child “in such situation that its person or health may be endangered,” as described in prior law, above. Thus the same circumstances of neglect were reportable under prior law, as under the definition pled.

The prior definition of child abuse included situations where “[a]ny person ... willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering.” The current definition of willful cruelty or unjustifiable punishment of a child, found at Penal Code section 11165.3 carries over the language of Penal Code section 273a, without distinguishing between the misdemeanor and felony standards.³⁸

The definition of unlawful corporal punishment or injury, found at Penal Code section 11165.4, as pled, prohibits “any cruel or inhuman corporal punishment or injury resulting in a traumatic condition.” Again, prior law required reporting of any non-accidental injuries, willful cruelty,

³⁸ Penal Code section 273a distinguishes between those “circumstances or conditions likely to produce great bodily harm or death” (felony), and those that are not (misdemeanor).

and “unjustifiable physical pain or mental suffering,” which encompasses all of the factors described in the definition for reportable unlawful corporal punishment or injury. The current law also excludes reporting of self-defense and reasonable force when used by a peace officer or school official against a child, within the scope of employment. This exception actually narrows the scope of child abuse reporting when compared to prior law.

Penal Code section 11165.5 defines abuse or neglect in out-of-home care as all of the previously described definitions of abuse and neglect, “where the person responsible for the child’s welfare is a licensee, administrator, or employee of any facility licensed to care for children, or an administrator or employee of a public or private school or other institution or agency.” Prior law required reporting of abuse by “any person,” and neglect by anyone who had a role in the care of the child.³⁹ Thus any abuse reportable under section 11165.5 would have been reportable under prior law, as detailed above. As further evidence of this redundancy, Statutes 2001, chapter 133, effective July 31, 2001, removed the reference to abuse or neglect in out-of-home care from the general definition of child abuse and neglect at Penal Code section 11165.6.

Therefore, staff finds that Penal Code sections 273a, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, and 11165.6, do not mandate a new program or higher level of service on school districts by increasing the scope of child abuse and neglect reporting.

(B) Training Mandated Reporters:

Penal Code Section 11165.7:

The claimant is also requesting reimbursement for training mandated reporters based on Penal Code section 11165.7.⁴⁰ Penal Code section 11165.7, subdivision (a), now includes the complete list of professions that are considered mandated reporters of child abuse and neglect; subdivision (b), as pled, provides that volunteers who work with children “are encouraged to obtain training in the identification and reporting of child abuse.” The code section continues, as amended by Statutes 2001, chapter 754:

(c) Training in the duties imposed by this article shall include training in child abuse identification and training in child abuse reporting. As part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees’ confidentiality rights.

(d) School districts that do not train their employees specified in subdivision (a) in the duties of mandated reporters under the child abuse reporting laws shall report

³⁹ *People v. Toney* (1999) 76 Cal.App.4th 618, 621-622: “No special meaning attaches to this language [care or custody] “beyond the plain meaning of the terms themselves. The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832, 73 Cal.Rptr.2d 257.)”

⁴⁰ Added by Statutes 1987, chapter 1459; amended by Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 2000, chapter 916, Statutes 2001, chapter 133 (urgency), and Statutes 2001, chapter 754.

to the State Department of Education the reasons why this training is not provided.

(e) The absence of training shall not excuse a mandated reporter from the duties imposed by this article.

Specifically, claimant alleges a reimbursable state mandate for school districts: "To either train its mandated reporters in child abuse or neglect detection and their reporting requirements; or, to file a report with the State Board of Education stating the reasons why this training is not provided."⁴¹

DSS argues there is no express duty in the test claim statute for school districts, as employers or otherwise, to provide training to mandated reporters. On page 3 of the November 25, 2002 comments, DSS states:

Claimant also asserts that Penal Code Section 11165.7 imposes mandated reporter training. (See Test Claim, page 123 lines 16-23) However, Claimant conceded that the training is optional, and can be avoided if it reports to the State Department of Education why such training was not provided. The form of the report is not specified in law. Therefore, the report can be transmitted orally or electronically, at no or de minimis cost to Claimant. Moreover, Claimant has not provided any facts to support its view that activities associated with such a report are in excess of that which was required under law in 1975.

Some history of Penal Code section 11165.7 is helpful to put the training language into legislative context. This section was substantively amended by Statutes 2000, chapter 916; prior to that amendment, subdivision (a) did not provide the complete list of mandated reporters, but instead defined the term "child care custodian" for the purposes of the Child Abuse and Neglect Reporting Act. The definition provided that a "child care custodian" included "an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education; [and] a classified employee of any public school who has been trained in the duties imposed by this article, if the school has so warranted to the State Department of Education." All other categories of "child care custodian" defined in former Penal Code section 11165.7, including teachers, child care providers, social workers, and many others, were not dependent on whether the individual had received training on being a mandated reporter. Following the definition of "child care custodian," the prior law of section 11165.7 continued:

(b) Training in the duties imposed by this article shall include training in child abuse identification and training in child abuse reporting. As part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees' confidentiality rights.

(c) School districts which do not train the employees specified in subdivision (a) in the duties of child care custodians under the child abuse reporting laws shall

⁴¹ Test Claim Filing, page 123.

report to the State Department of Education the reasons why this training is not provided.

(d) Volunteers of public or private organizations whose duties require direct contact and supervision of children are encouraged to obtain training in the identification and reporting of child abuse.

Thus, public and private school teacher's aides, and classified employees of public schools, were only "child care custodians," and by extension, mandated reporters, *if* they received training in child abuse identification and reporting. However, even under prior law, employers were not legally required to provide such training.

In *City of San Jose v. State of California*, the court clearly found that "[w]e cannot, however, read a mandate into language which is plainly discretionary."⁴² The court concluded "there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."⁴³ No mandatory language is used to require employers to provide mandated reporter training. Therefore, based on the plain language of the statute,⁴⁴ staff finds that Penal Code section 11165.7, as pled,⁴⁵ does not mandate a new program or higher level of service upon school districts for providing training to mandated reporter employees.

However, if mandated reporter training is not provided, the code section requires that school districts "shall report to the State Department of Education the reasons why." DSS argues that the reporting should be de minimis, and therefore not reimbursable. Staff finds that mandates law does not support this conclusion. The concept of a de minimis activity does appear in

⁴² *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

⁴³ *Id.* at page 1817.

⁴⁴ "[W]hen interpreting a statute we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense meaning." [Citation omitted.] *Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1261.

⁴⁵ Statutes 2004, chapter 842 amended subdivision (c), regarding training for mandated reporters. Current law now provides "(c) Employers are strongly encouraged to provide their employees who are mandated reporters with training in the duties imposed by this article. This training shall include training in child abuse and neglect identification and training in child abuse and neglect reporting. Whether or not employers provide their employees with training in child abuse and neglect identification and reporting, the employers shall provide their employees who are mandated reporters with the statement required pursuant to subdivision (a) of Section 11166.5."

Staff notes that "strongly encouraged" is not mandatory language, but an expression of legislative intent (see *Terrell R.*, *supra*, 102 Cal.App.4th 627, 639.) In addition, "Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose ..." [Citation omitted.] That purpose is not necessarily to change the law. 'While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute.'" *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568.

mandates case law – most recently in the California Supreme Court opinion on *San Diego Unified School Dist.*, which described a de minimis standard as it applied in a situation where there was an existing federal law program on due process procedures, but the state then added more, by “articulat[ing] specific procedures, not expressly set forth in federal law.”⁴⁶ The Court found that “challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the federal mandate.” The Court recognized that it was unrealistic to expect the Commission to determine which statutory procedures were required for minimum federal standards of due process, versus any “excess” due-process standards only required by the state.

The Court did not come up with a dollar amount as a threshold for determining de minimis additions to an existing non-reimbursable program, nor any other clear standard; simply finding that the costs and activities must be de minimis, “in context.” The context described by the Court in *San Diego* does not have a parallel here. The activity of reporting to the State Department of Education on the lack of training is a new activity clearly severable and distinct from any other part of the Child Abuse and Neglect Reporting Program, and is not implementing a larger, non-reimbursable program.

Finally, there must be a determination of what is meant by “school districts” in the context of this statute – did the Legislature intend that community college districts be included in this requirement? “School district” is not defined in this code section or elsewhere in CANRA, nor is there a general definition to be used in the Penal Code as a whole. Rules of statutory construction demand that we first look to the words in context to determine the meaning.⁴⁷

The report is required to be made to the State Department of Education, which generally controls elementary and secondary education. The State Department of Education is governed by the Board of Education. Education Code section 33031 provides: “The board shall adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state, and (d) for the government of other schools, *excepting* the University of California, the California State University, and *the California Community Colleges*, as may receive in whole or in part financial support from the state.”

A community college district generally provides post-secondary education, and the controlling state organization is the California Community Colleges Board of Governors.⁴⁸ Particularly since the reorganization of the Education Code by Statutes 1976, chapter 1010, there are growing statutory distinctions between K-12 “school districts” and “community college districts”

⁴⁶ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 888.

⁴⁷ “Statutory language is not considered in isolation. Rather, we ‘instead interpret the statute as a whole, so as to make sense of the entire statutory scheme.’” *Bonnell v. Medical Bd. of California*, *supra*, 31 Cal.4th 1255, 1261.

⁴⁸ Education Code section 70900 et seq.

throughout the code, including the Penal Code.⁴⁹ While these factors alone are not controlling, the fact that the training reporting requirement is limited to “school districts” and not all public and private schools, or even all employers of mandated reporters, is indication that the legislative intent was limited, and that school districts should be interpreted narrowly. Therefore, staff finds that the term “school districts” refers to K-12 school districts and is exclusive of community college districts in this case.

Thus, staff finds that Penal Code section 11165.7, subdivision (d), mandates a new program or higher level of service on K-12 school districts, as follows:

- Report to the State Department of Education the reasons why training is not provided, whenever school districts do not train their employees specified in Penal Code section 11165.7, subdivision (a), in the duties of mandated reporters under the child abuse reporting laws.

(C) Investigation of Suspected Child Abuse Involving a School Site or a School Employee

Penal Code Sections 11165.14 and 11174.3:

The claimant alleges that Penal Code section 11165.14 mandates school districts “[t]o assist and cooperate with law enforcement agencies investigating alleged complaints of child abuse or neglect committed at a school site.”⁵⁰ DSS argues Penal Code section 11165.14 does not impose a duty on its face to cooperate with and assist law enforcement agencies.

Penal Code section 11165.14,⁵¹ addresses the duty of law enforcement to “investigate a child abuse complaint filed by a parent or guardian of a pupil with a school or an agency specified in Section 11165.9 against a school employee or other person that commits an act of child abuse, as defined in this article, against a pupil at a schoolsite.” Staff finds that the plain language of Penal Code section 11165.14 does not require any unique activities of school district personnel as alleged by the claimant; therefore Penal Code section 11165.14 does not impose a new program or higher level of service on school districts.

Claimant further alleges a reimbursable state mandate is imposed by Penal Code section 11174.3;⁵² the code section, as pled, follows:

- (a) Whenever a representative of a government agency investigating suspected child abuse or neglect or the State Department of Social Services deems it necessary, a suspected victim of child abuse or neglect may be interviewed during school hours, on school premises, concerning a report of suspected child abuse or neglect that occurred within the child’s home or out-of-home care facility. The child shall be afforded the option of being interviewed in private or selecting any

⁴⁹ Penal Code section 291, 291.1 and 291.5 set up separate statutes for law enforcement informing public schools, private schools, and community college districts, respectively when a teacher, instructor or other employees are arrested for sex offenses.

⁵⁰ Test Claim Filing, page 123.

⁵¹ Added by Statutes 1991, chapter 1102, and amended by Statutes 2000, chapter 916.

⁵² Added by Statutes 1987, chapter 640, and amended by Statutes 1998, chapter 311, Statutes 2000, chapter 916.

adult who is a member of the staff of the school, including any certificated or classified employee or volunteer aide, to be present at the interview. A representative of the agency investigating suspected child abuse or neglect or the State Department of Social Services shall inform the child of that right prior to the interview.

The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Section 11167.5. A representative of the school shall inform a member of the staff so selected by a child of the requirements of this section prior to the interview. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. Failure to comply with the requirements of this section does not affect the admissibility of evidence in a criminal or civil proceeding.

(b) The Superintendent of Public Instruction shall notify each school district and each agency specified in Section 11165.9 to receive mandated reports, and the State Department of Social Services shall notify each of its employees who participate in the investigation of reports of child abuse or neglect, of the requirements of this section.

Claimant alleges that the mandated activities include notifying "the staff member selected, and for that selected staff member to be present at an interview of a suspected victim when the child so requests." DSS argues that the duty of a staff member to be present at the interview of a suspected victim, upon request, pursuant to Penal Code section 11174.3, is voluntary which "negates the mandate claim."

As discussed above, the court in *City of San Jose, supra*, found that "[w]e cannot, however, read a mandate into language which is plainly discretionary."⁵³ Penal Code section 11174.3 states: "A staff member selected by a child may decline the request to be present at the interview." Thus, staff finds that the optional nature of a school staff member's participation in the investigative interview process does not impose a reimbursable state-mandated program on school districts for participation in that activity.

In addition, there must be a determination of whether there was legislative intent that the terms "school" or "school districts," as used in this code section includes community colleges. In *Delaney v. Baker* (1999) 20 Cal.4th 23, 41-42, the Court found:

It is, of course, "generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute." (*People v. Dillon* (1983) 34 Cal.3d 441, 468

⁵³ *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

[194 Cal.Rptr. 390, 668 P.2d 697].) But that presumption is rebuttable if there are contrary indications of legislative intent.

Staff is unable to find any indications of legislative intent to indicate that community college districts were intended to be included in the use of the terms "school" or "school district" within Penal Code section 11174.3; therefore the terms are given the same meaning as determined for Penal Code section 11165.7, above, as excluding community college districts.

Therefore, based on the plain language of the statute, staff finds that Penal Code section 11174.3 mandates a new program or higher level of service on K-12 school districts for the following activity:

- Informing a selected member of the staff of the following requirements prior to the interview whenever a suspected victim of child abuse or neglect is to be interviewed during school hours, on school premises, and has requested that a staff member of the school be present at the interview:

The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Penal Code section 11167.5. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school.

(D) Employee Records

Penal Code Section 11166.5:

Penal Code section 11166.5,⁵⁴ subdivision (a), as pled, follows, in pertinent part:

(a) On and after January 1, 1985, any mandated reporter as specified in Section 11165.7, with the exception of child visitation monitors, prior to commencing his or her employment, and as a prerequisite to that employment, shall sign a statement on a form provided to him or her by his or her employer to the effect that he or she has knowledge of the provisions of Section 11166 and will comply with those provisions. The statement shall inform the employee that he or she is a mandated reporter and inform the employee of his or her reporting obligations

⁵⁴ Added by Statutes 1984, chapter 1718, and amended by Statutes 1985, chapters 464 and 1598, Statutes 1986, chapter 248, Statutes 1987, chapter 1459, Statutes 1990, chapter 931, Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 1993, chapter 510, Statutes 1996, chapter 1081, Statutes 2000, chapter 916, and Statutes 2001, chapter 133 (oper. Jul. 31, 2001.)

under Section 11166. The employer shall provide a copy of Sections 11165.7 and 11166 to the employee.⁵⁵

¶...¶

The signed statements shall be retained by the employer or the court [regarding child visitation monitors], as the case may be. The cost of printing, distribution, and filing of these statements shall be borne by the employer or the court.

This subdivision is not applicable to persons employed by public or private youth centers, youth recreation programs, and youth organizations as members of the support staff or maintenance staff and who do not work with, observe, or have knowledge of children as part of their official duties.

Subdivisions (b) through (d) are specific to the state, or concern court-appointed child visitation monitors, and are not applicable to the test claim allegations.

The claimant alleges that the code section requires school districts “[t]o obtain signed statements from its mandated reporters, on district forms, prior to commencing employment with the district, and as a prerequisite to that employment, to the effect that he or she has knowledge of his or her child abuse and neglect reporting requirements and their agreement to perform those duties.”

DSS argues that the claimant has not offered “any evidence that it was necessary to modify employment forms or that employment forms were so modified.” Staff notes that determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law.⁵⁶ A properly filed test claim alleging a new program or higher level of service was mandated by statute(s) or executive order(s), including declarations that the threshold level of costs mandated by the state were imposed pursuant to Government Code sections 17514 and 17564, is generally sufficient for the Commission to reach a legal conclusion on the merits.

Staff finds that the basic requirements of section 11166.5, subdivision (a) were first added to law by Statutes 1984, chapter 1718. The law affected employers of many categories of what are now termed “mandated reporters.”

The California Supreme Court in *County of Los Angeles v. State of California, supra*, found that “new program or higher level of service” addressed “programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy impose

⁵⁵ The amendment by Statutes 2000, chapter 916 removed a detailed statement of the content Penal Code section 11166 that was to be included in the form provided by the employer – and instead provides more generically that “The statement shall inform the employee that he or she is a mandated reporter and inform the employee of his or her reporting obligations under Section 11166.” Staff finds that the essential content requirements for the form remain the same.

In addition, Statutes 2000, chapter 916 first added the requirement that “The employer shall provide a copy of Sections 11165.7 and 11166 to the employee.”

⁵⁶ *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

unique requirements on local governments and do not apply generally to all residents and entities in the state.”⁵⁷ In *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545-1546, the court applied the reasoning to a claim for mandate reimbursement for elevator safety regulations that applied to all public and private entities.

County acknowledges the elevator safety regulations apply to all elevators, not just those which are publicly owned. FN4 As these regulations do not impose a “unique requirement” on local governments, they do not meet the second definition of “program” established by *Los Angeles*.

FN4. An affidavit submitted by State in support of its motion for summary judgment established that 92.1 percent of the elevators subject to these regulations are privately owned, while only 7.9 percent are publicly owned or operated.

Nor is the first definition of “program” met. ¶ ... ¶ In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not “a governmental function of providing services to the public.” FN5

FN5. This case is therefore unlike *Lucia Mar, supra*, in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835, 244 Cal.Rptr. 677, 750 P.2d 318) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537, 234 Cal.Rptr. 795.)

In this case, the statutory requirements apply equally to public and private employers of any individuals described as mandated reporters within CANRA. The alternative prong of demonstrating that the law carries out the governmental function of providing a service to the public is also not met. In this case, staff finds that informing newly-employed mandated reporters of their legal obligations to report suspected child abuse or neglect is not inherently a *governmental function* of providing service to the public, any more than providing safe elevators. Therefore, Penal Code section 11165.5 does not mandate a new program or higher level of service on school districts.

Issue 3: Do the test claim statutes found to mandate a new program or higher level of service also impose costs mandated by the state pursuant to Government Code section 17514?

Reimbursement under article XIII B, section 6 is required only if any new program or higher level of service is also found to impose “costs mandated by the state.” 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 or executive order that mandates a new program or higher level of service. The claimant alleges costs in excess of \$200, the minimum standard at the time of filing the test claim, pursuant to Government Code section 17564. A declaration of costs incurred was also submitted by the San Jose Unified School District.⁵⁸ Government Code section

⁵⁷ *County of Los Angeles v. State of California, supra*, 43 Cal.3d 46, 56.

⁵⁸ Test Claim Filing, exhibit 1.

17556 provides exceptions to finding costs mandated by the state. Staff finds that none have applicability to deny this test claim. Thus, for the activities listed in the conclusion below, staff finds accordingly that the new program or higher level of service also imposes costs mandated by the state within the meaning of Government Code section 17514, and none of the exceptions of Government Code section 17556 apply.

CONCLUSION

Staff concludes that Penal Code sections 11165.7 and 11174.3, as added or amended by Statutes 1987, chapters 640 and 1459, Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 1998, chapter 311, Statutes 2000, chapter 916, and Statutes 2001, chapters 133 and 754; mandate new programs or higher levels of service for school districts 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, for the following specific new activities for K-12 school districts:

- Reporting to the State Department of Education the reasons why training is not provided, whenever school districts do not train their employees specified in Penal Code section 11165.7, subdivision (a), in the duties of mandated reporters under the child abuse reporting laws. (Pen. Code, § 11165.7, subd. (d).)⁵⁹
- Informing a selected member of the staff of the following requirements prior to the interview whenever a suspected victim of child abuse or neglect is to be interviewed during school hours, on school premises, and has requested that a staff member of the school be present at the interview:

The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Penal Code section 11167.5. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. (Pen. Code, § 11174.3, subd. (a).)⁶⁰

⁵⁹ Added by Statutes 1987, chapter 1459; amended by Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 2000, chapter 916, Statutes 2001, chapter 133 (urgency), and Statutes 2001, chapter 754. Reimbursement for this activity begins July 1, 2000, based on the test claim filing date; the reimbursable activity was not substantively altered by later operative amendments.

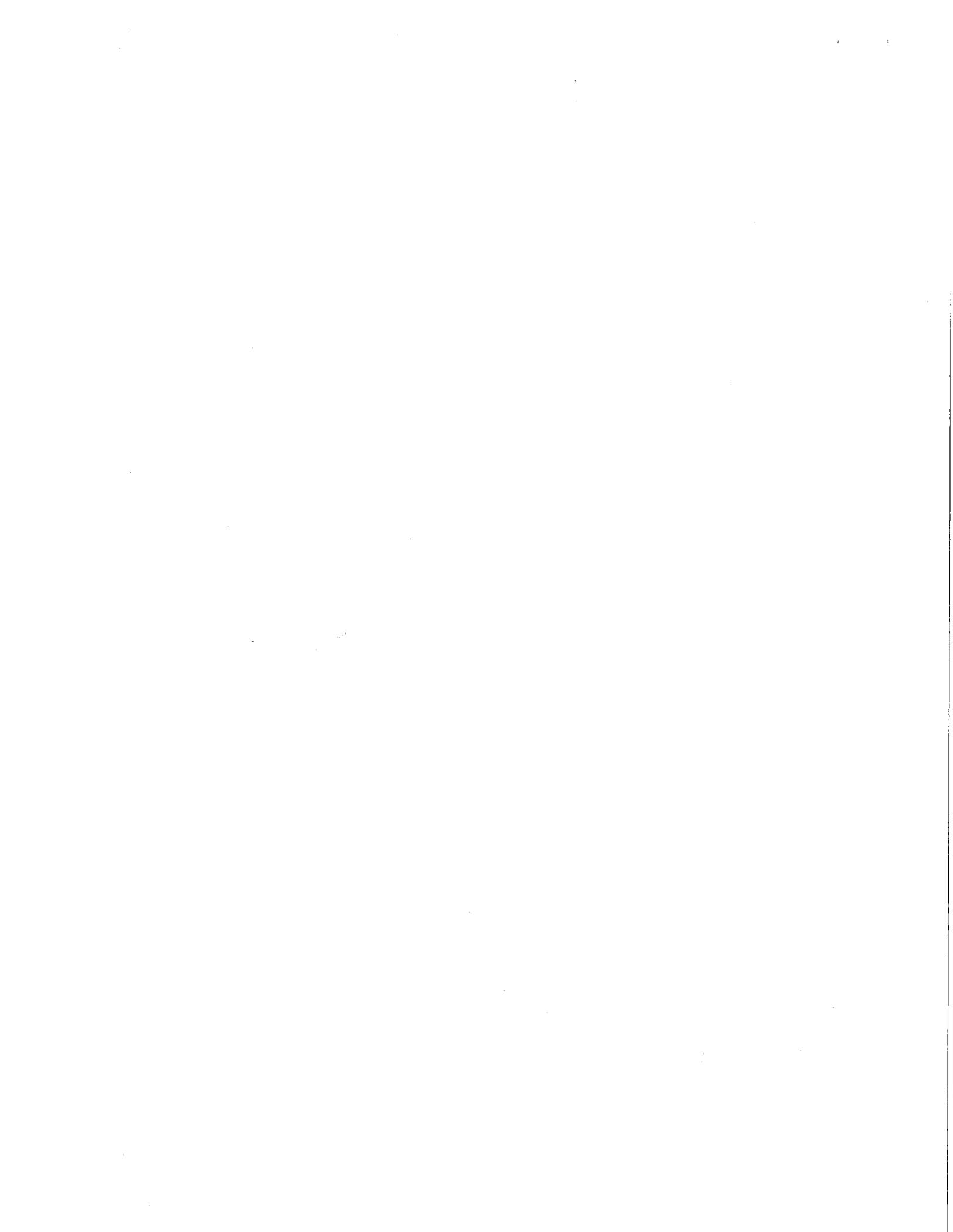
⁶⁰ Added by Statutes 1987, chapter 640, and amended by Statutes 1998, chapter 311, Statutes 2000, chapter 916. Reimbursement for this activity begins July 1, 2000, based on the test claim filing date; the reimbursable activity was not substantively altered by later operative amendments.

Staff concludes that any test claim statutes, executive orders and allegations not specifically approved above, do not mandate a new program or higher level of service, or impose costs mandated by the state under article XIII B, section 6.

Staff Recommendation

Staff recommends the Commission adopt this staff analysis to partially approve this test claim.

Non-Mandates Cases Cited



▶
Bonnell v. Medical Bd. of California
Cal.,2003.

Supreme Court of California
Harry BONNELL, Plaintiff and Respondent,
v.

MEDICAL BOARD OF CALIFORNIA, Defendant
and Appellant.
No. S105798.

Dec. 29, 2003.

Background: After Board of Medical Examiners granted Attorney General a 28-day stay of Board's decision dismissing accusations against physician, the Superior Court of Sacramento County, No. 00CS01234, James Timothy Ford, J., granted physician's request for administrative mandamus, and found that Board's order for reconsideration was void as petition was not filed within 10-day time limit. Board appealed. The Court of Appeal reversed.

Holding: The Supreme Court granted board's petition for review, superseding Court of Appeal's decision. Werdegar, J., held that reconsideration was not filed within time limits.

Reversed.
West Headnotes

[1] Statutes 361 ↪181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited

Cases

Statutes 361 ↪188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
When interpreting a statute the court must discover

the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense meaning.

[2] Statutes 361 ↪188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ↪212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other Matters. Most Cited Cases

Statutes 361 ↪214

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k214 k. In General. Most Cited Cases

If the language of a statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary, and it is presumed the Legislature meant what it said and the plain meaning of the statute governs.

[3] Statutes 361 ↪205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

Statutes 361 ↪206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire

Statute. Most Cited Cases

Statutory language is not considered in isolation, but is interpreted as a whole, so as to make sense of the entire statutory scheme.

[4] Administrative Law and Procedure 15A
 483

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(D) Hearings and Adjudications

15Ak480 Rehearing

15Ak483 k. Time for Application or Order for Rehearing. Most Cited Cases

Once petition for reconsideration of agency decision is filed, any stay that is granted can only be "solely for the purpose of considering the petition" and must be limited to 10 days; provision for maximum 30-day stay "for the purpose of filing an application for reconsideration" does not also allow 30-day stay to review petitions that have already been filed. West's Ann.Cal.Gov.Code § 11521(a).

See 9 Witkin, Cal. Procedure (4th ed. (1997) Administrative Proceedings, § 101.

[5] Statutes 361  181(2)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(2) k. Effect and

Consequences. Most Cited Cases

Courts avoid any statutory construction that would produce absurd consequences.

[6] Constitutional Law 92  2489

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative

Judgment

92k2489 k. Wisdom. Most Cited

Cases

(Formerly 92k70.3(4))

It is not the Supreme Court's function to inquire into the wisdom of underlying legislative policy choices of a statute.

[7] Statutes 361  217.4

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k217.4 k. Legislative History in

General. Most Cited Cases

When statutory language is clear and unambiguous, resort to the legislative history is unwarranted.

[8] Statutes 361  219(9.1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(9) Particular State Statutes

361k219(9.1) k. In General. Most

Cited Cases

A purported Medical Board interpretation of statute concerning time limits for filing petition for reconsideration of an agency decision was not entitled to judicial deference; Board's interpretation was incorrect in light of the unambiguous language of the statute, and statute was not a regulation promulgated by the board, but a legislative enactment applicable to a wide range of administrative agencies.

[9] 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

The Supreme Court is less inclined to defer to an agency's interpretation of a statute than to its interpretation of a self-promulgated regulation.

***533 *1258 **741 Bill Lockyer, Attorney General, Carlos Ramirez, Assistant Attorney General, Barry D. Ladendorf and Heidi R. Weisbaum, Deputy Attorneys General, for Defendant and Appellant. Law Offices of Richard K. Turner, Richard K. Turner; John J. Sansome, County Counsel (San Diego) and Thomas D. Bunton, Deputy County Counsel, for Plaintiff and Respondent.

WERDEGAR, J.

We address in this case the proper interpretation of Government Code section 11521, subdivision (a) (hereafter section 11521(a))^{FNI} concerning the length

of time a state administrative agency can stay its decision in order to review a petition for reconsideration once the petition has been filed. In this case, the Medical Board of California issued a 28-day stay to review an already filed petition. The trial court held that section 11521(a) allows a maximum 10-day stay. The Court of Appeal ***534 reversed. We reverse the judgment of the Court of Appeal.

FN1. All further statutory references are to the Government Code unless otherwise stated.

*1259

The Attorney General, representing the Medical Board of California (the Board), filed charges of gross negligence, repeated negligent acts, and incompetence against Dr. Harry Bonnell in connection with two autopsies he performed while serving as chief deputy medical examiner for San Diego County. A hearing was held before an administrative law judge (ALJ) who recommended that the Board's accusations be dismissed. The Board adopted the ALJ's decision on July 12, 2000, ordering that it take effect at 5:00 p.m. on August 11, 2000.

On August 9, 2000, two days before the effective date of the decision, the Attorney General filed a petition for reconsideration. The next day, the Attorney General filed a request pursuant to section 11521(a) for a stay of the Board's decision in order to give the Board additional time to review the petition. On August 11, the Board granted a 28-day stay, extending the effective date of the decision from August 11 to September 8. The order stated the stay was granted "solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration."

Bonnell thereafter filed a timely petition for writ of administrative mandate in the superior court. While that petition was pending, the Board on September 6 granted the Attorney General's petition for reconsideration. The next day, the trial court issued an alternative writ of mandate, commanding the Board to set aside its 28-day stay or to show cause why it should not be set aside.

Following an evidentiary hearing, the trial court held that section 11521(a) allowed the Board to grant only a maximum 10-day stay to review an already filed

petition and that the Board's order for reconsideration was therefore void for lack of jurisdiction. The Court of Appeal reversed. We granted Bonnell's petition for review.

Section 11521(a), part of the Administrative Procedure Act (APA) (§ 11340 et seq.), authorizes a state agency to order a reconsideration of its own administrative adjudication. Section 11521(a) states: "The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of ***742 not to exceed 30 days which the agency may grant for the purpose of filing *1260 an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied."

Before the enactment of section 11521(a), we recognized that in the absence of statutory authority, administrative agencies generally lacked the power to order reconsiderations. (*Olive Proration etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204, 209, 109 P.2d 918; *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407-408, 57 P.2d 1323.) Section 11521(a) was enacted in 1945 (Stats.1945, ch. 867, § 1, p. 1634) and amended in 1953 to add the final segment of the second sentence, which provides for a stay of "not to exceed ***535 30 days which the agency may grant for the purpose of filing an application for reconsideration" (Stats.1953, ch. 964, § 1, p. 2340). In 1987 the statute was amended to include the third sentence, providing for a maximum 10-day stay "solely for the purpose of considering the petition" (Stats.1987, ch. 305, § 1, pp. 1369-1370). Section 11521(a) applies to the Board. (§ § 11500, subd. (a), 11373.)

The trial court concluded the language in section 11521(a) allowed the Board to grant only a maximum 10-day stay to review an already filed petition. The Court of Appeal disagreed. Relying on *Koehn v.*

State Board of Equalization (1958) 166 Cal.App.2d 109, 333 P.2d 125(Koehn), the court held that the second sentence in section 11521(a), providing a maximum 30-day stay “for the purpose of filing an application for reconsideration,” also allowed a 30-day stay to review petitions that had already been filed.

Koehn, the only case factually analogous to the one before us, was decided almost 30 years before the 1987 amendment that added to section 11521(a) the provision for a maximum 10-day stay “solely for the purpose of considering the petition.” In Koehn, the agency decision at issue was to become effective on September 21. (Koehn, supra, 166 Cal.App.2d at p. 112, 333 P.2d 125.) A petition for reconsideration was filed on September 10, and a 22-day stay was granted on September 17. (Ibid.) Koehn argued the 22-day stay was unlawful because the petition for reconsideration had been filed prior to the issuance of the stay and therefore could not qualify as “a stay for the purpose of filing an application for reconsideration [as provided in section 11521(a)], because such an application was then on file.” (Id. at p. 113, 333 P.2d 125.) In rejecting the argument, the Koehn court relied upon the rule of statutory construction that “‘where the language of a statute is ... reasonably susceptible of either of two constructions, one which, in its application, will render it reasonable, fair, and just, ... and another which, in its application, would be productive of *1261 absurd consequences, the former construction will be adopted.’” (Id. at pp. 114-115, 333 P.2d 125.) Limiting the maximum 30-day stay to apply only where a petition for reconsideration had yet to be filed, the court reasoned, “would result in the absurd situation, that if one desiring reconsideration would withhold filing his petition the board could stay for 30 days the effective date of the decision, but if he filed such petition it could not and would have to determine his petition before the effective date of the order arrived.” (Id. at p. 114, 333 P.2d 125.) Thus, the “absurdity” consisted in the circumstance that the agency would have less time to review and hence would be more likely to deny the petition of a diligent petitioner than that of a dilatory one. The court concluded “the [30-day] stay provided for is not just to allow additional time for the filing of the petition but is also to allow additional time to consider it and to order reconsideration if deemed advisable. This would necessarily apply to a petition already filed as well as to one that was to be filed. This is the common sense construction of the statute.” (Ibid.)

The Court of Appeal in the present case determined that the 1987 amendment adding to section 11521(a) the maximum 10-day stay “solely for the purpose of considering the petition” did not remedy the problem identified in Koehn, but instead supported the **743 Koehn interpretation. It held that section 11521(a) allows an agency to grant a maximum 30-day stay either to allow a party to file a petition for reconsideration or to allow an agency to review an already filed petition, and that the maximum 10-day stay allows an agency an ***536 additional 10 days, if necessary, to review an already filed petition.

[1][2][3] “We begin our discussion with the oft-repeated rule that when interpreting a statute we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute’s words their plain, commonsense meaning.” (Kavanaugh v. West Sonoma County Union High School Dist. (2003) 29 Cal.4th 911, 919, 129 Cal.Rptr.2d 811, 62 P.3d 54.) In undertaking this task, we adhere to the guideline that “[i]f the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature’s intent is unnecessary.” (Ibid.) When the statutory language is unambiguous, “‘we presume the Legislature meant what it said and the plain meaning of the statute governs.’” (Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal.4th 1036, 1047, 80 Cal.Rptr.2d 828, 968 P.2d 539.) Statutory language is not considered in isolation. Rather, we “instead interpret the statute as a whole, so as to make sense of the entire statutory scheme.” (Carrisales v. Department of Corrections (1999) 21 Cal.4th 1132, 1135, 90 Cal.Rptr.2d 804, 988 P.2d 1083.)

A. The Language of Section 11521(a) Is Unambiguous

As previously discussed, section 11521(a) specifies the amount of time an administrative agency has to order a reconsideration of its own *1262 decision and states that if no action is taken by the agency within the time allowed, the petition is deemed denied. (§ 11521(a); Gamm v. Board of Medical Quality Assurance (1982) 129 Cal.App.3d 34, 35-36, 181 Cal.Rptr. 23.) The second sentence of the statute provides the general rule that “[t]he [agency’s] power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent ...” (§ 11521(a).) The statute then states two exceptions. An agency may, pursuant to the second segment of the second sentence, shorten the standard 30-day period in which to order a

reconsideration by making its decision effective on a date “prior to the expiration of the 30-day period.” (*Ibid.*) Alternatively, pursuant to the third segment of the second sentence, an agency can lengthen its period to act by making its decision effective “at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration” ^{FN2} (§ 11521(a)), provided this maximum 30-day stay is granted within the initial 30-day (or less) period (§ 11519, subd. (a); see *Koehn, supra*, 166 Cal.App.2d at p. 113, 333 P.2d 125). The third sentence of section 11521(a) provides that “[i]f additional time is needed to evaluate a petition for reconsideration” after “the expiration of any of the [three] applicable periods,” a maximum 10-day stay may be granted.

FN2. “The power to order reconsideration expires (a) 30 days after delivery or mailing of the decision to the respondent, (b) on an earlier date on which the decision becomes effective, or (c) on the termination of a stay of no more than 30 days granted for the purpose of filing an application for reconsideration.” (9 *Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 101, p. 1146.*)

[4] Turning to the question in this case, we find it evident that once a petition for reconsideration has been filed, an agency may no longer grant the maximum 30-day stay authorized by the second sentence of section 11521(a); the plain language of the statute dictates that the maximum 30-day stay is “for the purpose of filing an application for reconsideration.” (§ 11521(a), italics added.) We agree with Bonnell that once a petition has been filed, ***537 any stay that is granted can only be “solely for the purpose of considering the petition” (*ibid.*) and must be limited to 10 days.

Our construction limiting the Board to a 10-day stay for already filed petitions does not, of course, mean that an administrative agency will always have only 10 days to review a filed petition for reconsideration. Like the original 30-day (or less) period, the maximum 30-day stay period is not *solely* for **744 the purpose of filing a petition. If, for example, the petitioner were to file on the fifth day of the 30-day stay, the agency would have 25 days remaining to evaluate the petition. If, at the end of this period, the agency believed it needed additional time to review the petition, it could grant a maximum 10-day stay. The word “solely,” therefore, which is found in the

third sentence restricting the purpose of the 10-day stay, is presumably omitted *1263 from the last segment of the second sentence, authorizing a 30-day stay, to enable an agency to begin evaluating a petition as soon as it is filed. This comports with the language in the third sentence, which indicates that the maximum 10-day stay is not mandatory, but available “[i]f additional time is needed to evaluate a petition.” (§ 11521(a).) The third sentence presumes the agency may already have had sufficient time to evaluate the petition.

The Attorney General argues that limiting agencies to a 10-day stay for consideration of already filed petitions will result in the same absurdity recognized in *Koehn, supra*, 166 Cal.App.2d 109, 333 P.2d 125, in that “[t]he more diligent party is penalized while the more dilatory one is rewarded.” (See *ante*, 8 Cal.Rptr.3d at pp. 535-536, 82 P.3d at pp. 742-743.)

[5][6] While “[w]e avoid any construction that would produce absurd consequences” (*Flannery v. Prentice (2001) 26 Cal.4th 572, 578, 110 Cal.Rptr.2d 809, 28 P.3d 860*), construing the plain language of section 11521(a) to allow a maximum 10-day stay for review of already filed petitions results in no absurdity. In amending section 11521(a) to add the 10-day stay provision, the Legislature resolved the apparent absurdity identified by the *Koehn* court. Implicit in the statutory amendment is a legislative determination that an agency needs, at most, 10 days to review a petition. This is because, at the extreme, if a party were to file the day before the effective date or on the last day of a 30-day stay and the agency then granted a 10-day stay, the agency would have at most 10 days to decide whether to grant the petition.^{FN3} If 10 days is in fact insufficient time for agency review, or if dilatory parties are accorded some advantage, this “absurdity” is best addressed by the Legislature. It is not our function to “inquir[e] into the ‘wisdom’ of underlying policy choices.” (*People v. Bunn (2002) 27 Cal.4th 1, 17, 115 Cal.Rptr.2d 192, 37 P.3d 380.*) “[O]ur task here is confined to statutory construction.” (*Davis v. KGO-T.V., Inc. (1998) 17 Cal.4th 436, 446, 71 Cal.Rptr.2d 452, 950 P.2d 567.*)

FN3. Of course, the 10-day stay provision has no bearing on the time allowed to decide the merits of the claims made in a petition for rehearing. (See § 11521, subd. (b), 11517.)

B. Legislative Intent

The Attorney General maintains that even if the 1987 amendment to section 11521(a) undermines the reasoning of Koehn, supra, 166 Cal.App.2d 109, 333 P.2d 125, we should nonetheless adhere to its holding, because the Legislature presumably was aware of the Koehn interpretation and, by not altering the second sentence of the statute, acquiesced in it. Applying this rule of construction is unwarranted***538 because we have determined the language of section 11521(a) is clear and unambiguous. (Agnew v. State Bd. of Equalization (1999) 21 Cal.4th 310, 323, 87 Cal.Rptr.2d 423, 981 P.2d 52.)

[7] *1264 For the same reason we decline to review the legislative history relating to the 1953 amendment adding the 30-day stay provision to section 11521(a) and the 1987 amendment adding the maximum 10-day stay. We have consistently stated that when statutory language is clear and unambiguous, resort to the legislative history is unwarranted. (People v. Johnson (2002) 28 Cal.4th 240, 247, 121 Cal.Rptr.2d 197, 47 P.3d 1064; see also Preston v. State Bd. of Equalization (2001) 25 Cal.4th 197, 213, 105 Cal.Rptr.2d 407, 19 P.3d 1148.) We adhere to that position here.

C. Deference to the Board's Interpretation of Section 11521(a)

[8] The Attorney General argues that the Board has consistently interpreted section 11521(a) to allow a maximum 30-day stay for evaluating already filed petitions and contends that the Board's interpretation is entitled to deference. He cites to a declaration **745 by David T. Thornton, chief of enforcement for the Board,^{FN4} and directs our attention to a page from the Board's Discipline Coordination Unit Procedure Manual entitled "Request for MBC Stay."^{FN5} Even were we to assume these two items from the record are conclusive proof that the Board has consistently interpreted section 11521(a) as the Attorney General argues, the purported Board interpretation is not entitled to judicial deference.

^{FN4} Thornton's declaration states: "It is [the Board's] position that section 11521(a) allows for a 30-day stay ... for the purpose of both filing and reviewing a petition for reconsideration.... The ten days is added to the initial stay period."

^{FN5} "MBC" stands for Medical Board of California. The page describes a stay request and explains that stays "are generally requested ... in order to allow time to prepare and file a Petition for Reconsideration. The agency can also grant its own stay to allow time to consider a Petition for Reconsideration.... [¶] ... [¶] An additional 10 day stay may be granted solely to allow the voting body sufficient time to vote on the matter." The Attorney General posits that because the text describing the 10-day stay appears in a lower, separate paragraph on the page in the manual, the Board necessarily believed the 30-day stay applied to already filed petitions.

We addressed the issue of judicial deference to administrative agency statutory interpretation in Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (Yamaha). In Yamaha, the Court of Appeal had determined a State Board of Equalization publication represented the dispositive interpretation of Revenue and Taxation Code section 6008 et seq. (Yamaha, supra, at pp. 5-6, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) In reversing and remanding, we acknowledged that while "agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts" (id. at p. 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031), "agency interpretations are not binding or ... authoritative" (id. at p. 8, 78 Cal.Rptr.2d 1, 960 P.2d 1031). "Courts must, in short, independently judge the text of [a] statute...." (id. at p. 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) We determined that the weight accorded to an agency's interpretation is "fundamentally situational" (id. at p. 12, 78 Cal.Rptr.2d 1, 960 P.2d 1031, italics *1265 omitted) and "turns on a legally informed, commonsense assessment of [its] contextual merit" (id. at p. 14, 78 Cal.Rptr.2d 1, 960 P.2d 1031). Yamaha set down a basic framework of factors as guidance and concluded that the degree of deference accorded should be dependent in ***539 large part upon whether the agency has a " 'comparative interpretative advantage over the courts' " and on whether it has arrived at the correct interpretation. (id. at p. 12, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

[9] Applying these basic principles of judicial review, our deference is unwarranted here. The Board's interpretation is incorrect in light of the unambiguous language of the statute. We do not accord deference to an interpretation that is " 'clearly erroneous.' " (People ex rel. Lungren v. Superior Court (1996) 14

Cal.4th 294, 309, 58 Cal.Rptr.2d 855, 926 P.2d 1042; Yamaha, supra, 19 Cal.4th at p. 14, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Furthermore, section 11521(a) is not a regulation promulgated by the Board, but a legislative enactment applicable to a wide range of administrative agencies. We are less inclined to defer to an agency's interpretation of a statute than to its interpretation of a self-promulgated regulation. (Yamaha, supra, at p. 12, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Nor does the Board have any particular expertise in interpreting widely applicable administrative adjudication statutes. (Ibid.; see California Advocates for Nursing Home Reform v. Bontá (2003) 106 Cal.App.4th 498, 505-506, 130 Cal.Rptr.2d 823 [declining to accord deference to regulations promulgated by the Dept. of Health Services pursuant to the APA].) While the Board is generally required to adhere to the provisions of the APA (Bus. & Prof.Code, § 2230), this responsibility is incidental to its primary duty to carry out disciplinary actions against members of the medical profession (*id.*, § 2004).

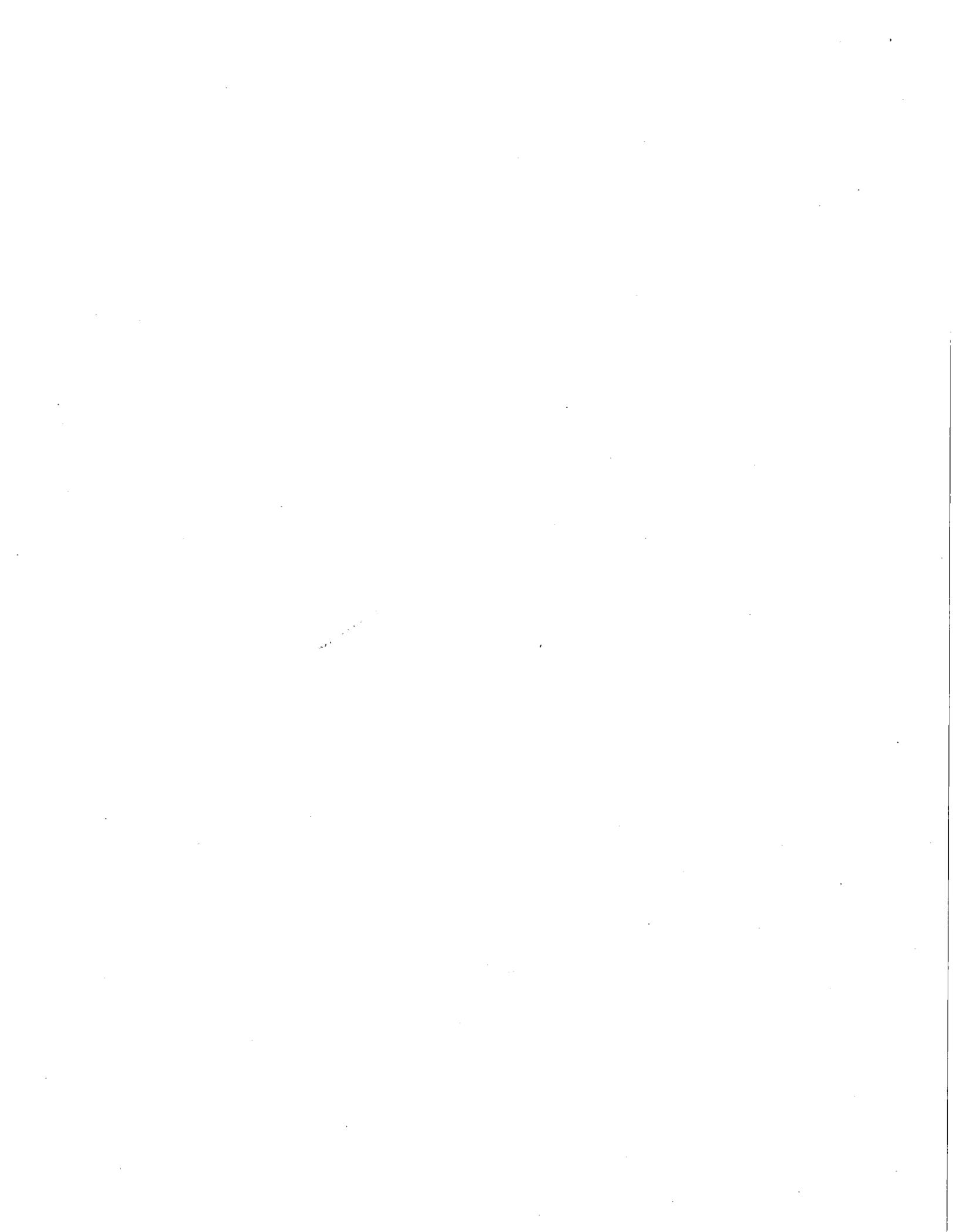
In sum, we agree with Bonnell that section 11521(a) is unambiguous and allows a maximum 10-day stay for agency review of an already filed petition for reconsideration. As a result, the Board's decision to order a reconsideration is void for lack of jurisdiction. **746(American Federation of Labor v. Unemployment Ins. Appeals Bd. (1996) 13 Cal.4th 1017, 1042, 56 Cal.Rptr.2d 109, 920 P.2d 1314 ["An administrative agency must act within the powers conferred upon it by law and may not act in excess of those powers.... Actions exceeding those powers are void"]; Ginns v. Savage (1964) 61 Cal.2d 520, 525, 39 Cal.Rptr. 377, 393 P.2d 689 [agency's power to order reconsideration expires on the date set as the effective date of the decision].)

The judgment of the Court of Appeal is reversed.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, CHIN, BROWN, and MORENO, JJ.
Cal.,2003.

Bonnell v. Medical Bd. of California
31 Cal.4th 1255, 82 P.3d 740, 8 Cal.Rptr.3d 532, 03
Cal. Daily Op. Serv. 11,170, 2003 Daily Journal
D.A.R. 14,091

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C

COMMUNITY REDEVELOPMENT AGENCY OF
THE CITY OF LOS ANGELES, Plaintiff and

Appellant,

v.

COUNTY OF LOS ANGELES et al., Defendants and
Respondents.

No. B136115.

Court of Appeal, Second District, Division 2,
California.

May 31, 2001.

SUMMARY

A community redevelopment agency brought a writ of mandate action against a county seeking declaratory and injunctive relief, and damages. The dispute concerned the manner of sharing property tax revenues. Plaintiff alleged that the county's procedure of offsetting or withholding the administrative costs from the revenue it allocated and paid to plaintiff was not authorized by Rev. & Tax. Code, § 95.3, and that the sums withheld should not be included as tax increment received by plaintiff for purposes of certain tax increment limitations. The trial court denied the writ petition and dismissed the complaint. (Superior Court of Los Angeles County, No. BC197625, Robert H. O'Brien, Judge.)

The Court of Appeal affirmed. It held that the procedure followed by the county was what was prescribed in Rev. & Tax. Code, § 95.3. Any other interpretation could allow a redevelopment agency to avoid or shift the financial burden of collecting property tax revenues to other agencies or the county. The court further held that Cal. Const., art. XVI, § 16 (tax revenue increment from redevelopment plan area shall be allocated to and paid into special fund of plan area), does not prevent the Legislature from altering the levying and collection of tax on redevelopment project property consistent with alterations in the levying and collection of tax on other property. (Opinion by Boren, P. J., with Cooper and Doi Todd, JJ., concurring)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Public Housing and Redevelopment § 5--
Redevelopment--Allocation of Property Tax
Revenues Between County and Redevelopment
Agency.

In a property tax dispute between a community redevelopment agency and a county, the trial court did not err in *720 denying plaintiff agency's mandate petition and dismissing its complaint for declaratory and injunctive relief and damages. A redevelopment agency is entitled to the increase in tax revenues, or tax increments, attributable to the area covered by the agency's plans. Defendant county, in calculating its payment of revenues to plaintiff, deducted or withheld under Rev. & Tax. Code, § 95.3, those administrative costs attributable to each redevelopment plan from the tax increment allocated to each plan. This procedure is what is prescribed in the statute. Any other interpretation could allow a redevelopment agency to avoid or shift the financial burden of property tax collection to other agencies or the county. Cal. Const., art. XVI, § 16 (tax revenue increment from redevelopment plan area shall be allocated to and paid into special fund of plan area), does not prevent the Legislature from altering the levying and collection of tax on redevelopment project property consistent with alterations in the levying and collection of tax on other property.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989)
Taxation, § 124.]

(2) State of California § 10--Attorney General--
Opinions.

An opinion of the Attorney General is not a mere advisory opinion, but a statement that, although not binding on the judiciary, must be regarded as having a quasi-judicial character. It is entitled to great respect and given great weight by the courts.

COUNSEL

James K. Hahn, City Attorney, Dov Lesel, Assistant City Attorney, Ronald Low, Deputy City Attorney; Goldfarb & Lipman, Lee C. Rosenthal and David M. Robinson for Plaintiff and Appellant.

Lloyd W. Pellman, County Counsel, and Thomas M. Tyrrell, Principal Deputy County Counsel, for Defendants and Respondents.

BOREN, P. J.

Introduction

Community Redevelopment Agency of the City of Los Angeles (CRA) and the County of Los Angeles (County) dispute the manner in which *721 property tax revenue is shared. The dispute centers on County's interpretation of Revenue and Taxation Code section 95.3 (section 95.3), which reduces the amount of revenue that CRA receives. We uphold County's interpretation and affirm.

Background

California law authorizes the creation of community redevelopment agencies to rehabilitate blighted areas. These agencies adopt plans for specific blighted areas, and pursuant to these plans the agencies become entitled to the increase in tax revenues attributable to the redevelopment area covered by the agencies' plans. Generally, as property values in a redevelopment area increase, tax revenues also increase. These incremental increases are referred to as "tax revenue increments" or simply "tax increments." Community redevelopment agencies typically use bonds to fund redevelopment projects and then use allocations of the tax increments to repay the bonds.

The Legislature, in accordance with the California Constitution (art. XVI, § 16), has provided that local taxing agencies remain entitled to the tax revenues they would have received had development not been undertaken. By the same token, redevelopment agencies are entitled as a general principle to the increase in tax revenue generated by a redevelopment project. (Health & Saf. Code, § § 33670, 33671; Redevelopment Agency v. County of San Bernardino (1978) 21 Cal.3d 255, 258, 266 [145 Cal.Rptr. 886, 578 P.2d 133].)

Nonetheless, the Legislature has previously required that redevelopment plans contain limitations on the total amount of tax increment that a plan can receive. Plans promulgated with such tax increment limitations thus cap the total amount of tax increment a plan will receive.

The present appeal concerns interpretation of section 95.3 and its application with respect to tax increment limitations. Section 95.3 allows a county's auditor to attribute administrative and overhead costs to various jurisdictions and agencies-including community redevelopment agencies-for which a county collects and to which a county pays tax revenues. CRA is one of the agencies for which County collects tax

revenue. County, in calculating its payment of tax revenues to CRA, deducts or withholds the section 95.3 administrative costs attributable to each redevelopment plan from the tax increment allocated to each plan.

With respect to three redevelopment plans, CRA disputes County's interpretation and application of section 95.3. CRA does not assert that County *722 improperly calculates the amount of the deduction. Rather, CRA asserts that County's procedure of offsetting or withholding the administrative costs from the revenue it allocates and pays to CRA is not authorized by section 95.3. County responds that if the administrative costs are not deducted from the allocation, redevelopment agencies would, in the final analysis, avoid payment of these costs, shift the burden to other jurisdictions and special districts, and make illusory the assessment of the administrative fee.

CRA filed a complaint contending that County's methodology is improper and results in underpayment of revenue to CRA. The trial court did not agree with CRA, denied CRA's petition for writ of mandate, and dismissed the complaint for declaratory relief, injunctive relief and damages.

Factual and Procedural History

The Community Redevelopment Law (CRL) and other statutes authorize the formation of redevelopment agencies such as CRA and empower them to adopt redevelopment plans. (Health & Saf. Code, § 33000 et seq.) CRA has adopted three plans denominated respectively the Pico Union #2 Plan (Pico Union Plan), the Crenshaw Plan, and the Central Business District Plan (CBD Plan). CRA adopted the Pico Union Plan on November 24, 1976, the Crenshaw Plan on May 9, 1984, and the CBD Plan on July 18, 1975.

The CRL and portions of the Revenue and Taxation Code provide that a redevelopment plan receives property tax revenue generated by the increases in property values attributable to the area governed by the plans and also by tax rate increases. A county's auditor then calculates and pays a redevelopment agency in accordance with certain formulas proportionally related to the increase in tax revenues.

The CRL limits the duration of redevelopment plans and requires certain plans to limit the tax dollars they may receive pursuant to the plans. (Health & Saf. Code, § § 33333.2, 33333.4.) Section 33333.2 requires that redevelopment plans have time

limitations. Section 33333.4 pertains to plans adopted before October 1, 1976, without these time limitations and, in subdivision (a)(1), requires that such a redevelopment plan be subject to: "A limitation on the number of dollars of taxes which may be divided and allocated to the redevelopment agency pursuant to the plan, including any amendments to the plan. Taxes shall not be divided and shall not be allocated to the redevelopment agency beyond that limitation." Subdivision (g) of section 33333.4 pertains to redevelopment plans adopted after October 1, 1976, and prior to January 1, 1994, and in subdivision (g)(1) contains the exact requirement presented in subdivision (a)(1). Thus, all three redevelopment plans at issue herein are subject to the allocation limitation provisions of section 33333.4. *723

In the early 1990's, at a time when public funds were in crisis, the Legislature enacted several provisions to foster the economic viability of county governments. The Legislature enabled counties to recoup the administrative and overhead costs of collecting and apportioning tax revenues. (See Sen. Bill No. 2557 (1989-1990 Reg. Sess.), enacted as Stats. 1990, ch. 466, § 4, pp. 2043-2045.) Several adjustments were made concerning the special revenue and tax problems of school districts. In 1994, the Legislature enacted section 95.3 (Assem. Bill No. 3347 (1993-1994 Reg. Sess.), enacted as Stats. 1994, ch. 1167, § 3, p. 6906), which was later amended.

Presently, subdivisions (a) and (b) of section 95.3 provide in pertinent part as follows:

"(a) Notwithstanding any other provision of law, for the 1990-91 fiscal year and each fiscal year thereafter, the auditor shall divide the sum of the amounts calculated with respect to each jurisdiction, Educational Revenue Augmentation Fund (ERAF), or community redevelopment agency pursuant to Sections 96.1 and 100, or their predecessor sections, and Section 33670 of the Health and Safety Code, by the countywide total of those calculated amounts. The resulting ratio shall be known as the 'administrative cost apportionment factor' and shall be multiplied by the sum of the property tax administrative costs incurred in the immediately preceding fiscal year by the assessor, tax collector, county board of equalization and assessment appeals boards, and auditor to determine the fiscal year property tax administrative costs proportionately attributable to each jurisdiction, ERAF, or community redevelopment agency....

"(b)(1) Each proportionate share of property tax administrative costs determined pursuant to subdivision (a), except for those proportionate shares determined with respect to a school entity or ERAF, shall be deducted from the property tax revenue allocation of the relevant jurisdiction or community redevelopment agency, and shall be added to the property tax revenue allocation of the county...."

In sum, section 95.3 authorizes a county to apportion to itself from tax revenues what the parties variously call a "Property Tax Administrative Funding," or a "Property Tax Administrative Fee," or simply a "PTAF." Using a formula based on a ratio, which the statute calls the "administrative cost apportionment factor," (§ 95.3, subd. (a)) a county's auditor determines the total cost of administering the collection of property taxes and then calculates the share of those costs attributable to each jurisdiction, including community redevelopment agencies. Under subdivision (b)(1), the county deducts this "proportionate share ... from the property tax revenue *724 allocation of the ... community redevelopment agency." The county then adds the deducted amounts "to the property tax revenue allocation of the county." (*Ibid.*) County's deduction of PTAF reduces CRA's net allocation.

Subdivision (e) of section 95.3 states: "(e) It is the intent of the Legislature in enacting this section to recognize that since the adoption of Article XIII A of the California Constitution by the voters, county governments have borne an unfair and disproportionate part of the financial burden of assessing, collecting, and allocating property tax revenues for other jurisdictions and for redevelopment agencies. The Legislature finds and declares that this section is intended to fairly apportion the burden of collecting property tax revenues and is not a reallocation of property tax revenue shares or a transfer of any financial or program responsibility."

The Pico Union Plan contains a \$14 million tax increment limitation divided and allocated over the life of the plan. The tax revenue increment paid to that plan reached the \$14 million limitation amount on or about July 20, 1994. CRA thereafter repaid to County an amount above the limitation that had been paid to it by County. As to this plan, CRA receives no further tax increment. But on March 1, 1996, County determined that it was owed an additional \$107,113.63-the amount of PTAF owing. County deducted that amount from subsequent allocations to the CRA.

The Crenshaw Plan limits allocation of tax increments to \$500,000 per year. In each fiscal year from 1993-1994 through 1997-1998 (except for 1995-1996), the Crenshaw Plan had a tax increment of \$500,000. For each of those years, County deducted the PTAF from the tax increment allocation. The total PTAF deducted for this period is \$67,261.55. [FN1]

FN1 The parties agree that the PTAF's for the Crenshaw Plan were as follows: \$20,289.26 for 1993-1994; \$16,159.91 for 1994-1995; \$14,942.76 for 1996-1997; and \$15,669.62 for 1997-1998. The sum of these amounts is \$67,061.55. (Because of the agreement of the parties, we do not concern ourselves with an apparent \$200 discrepancy.)

Initially, the CBD Plan had a \$7.1 billion limitation for the life of the plan. In a lawsuit, *Bernardi v. City of Los Angeles* (Super. Ct. L.A. County, 1977, No. C133468), the parties stipulated to a judgment that reduced the limitation to \$750 million. That tax increment limitation will be reached in either 2003 or 2004. Upon reaching the limitation, County, using its present methodology, will have, in CRA's view, underpaid CRA approximately \$5 million.

Alleging the foregoing amounts are underpayments of, or improper offsets against, its allocation of tax revenue increments, CRA filed a complaint for *725 declaratory relief, writ of mandate, injunction and damages. The complaint alleges that CRA and County dispute the manner in which County is required to apply section 95.3. CRA contends that "the funds allocated and paid to the County pursuant to ... Section 95.3 should not be included as Tax Increment received by [CRA] for purposes of the Tax Increment limitations in" CRA's three plans named above.

The parties stipulated to the operable facts, to the admission of documentary evidence, and to the trial court's use of Legislative Intent Service materials provided to the court. The parties agreed that the matter was entirely one of law.

After the receipt of trial briefs, further declarations and argument, the trial court denied the petition for writ of mandate (the second cause of action) and invited further briefing on whether the court's ruling subsumed the remaining causes of action. Subsequently, the trial court entered a judgment in

favor of County, denying all causes of action and dismissing the complaint. The court also filed a written statement of decision.

On appeal, CRA contends that the trial court's interpretation of section 95.3 is erroneous and not consistent with the legislative history or rules of statutory construction. CRA also maintains that under CRA's interpretation of section 95.3, County will be fully compensated for its administrative costs.

Discussion

(1a) The only issue for this court to decide is the application of section 95.3 to County's procedure of deducting the PTAF from CRA's gross allocation of tax increments. County's methodology is, on its face, rational. It also seems to accord with the legislative determination that the county auditor should deduct "[e]ach proportionate share of property tax administrative costs determined pursuant to subdivision (a) ... from the property tax revenue allocation of the ... community redevelopment agency, and ... add[] [it] to the property tax revenue allocation of the county." (§ 95.3, subd. (b)(1).)

As we discern the substance of CRA's proposed interpretation of section 95.3, CRA contends that the section 95.3 funds "are allocated and paid to the County and not to the Agency." CRA in essence claims that County's procedure works an impermissible reallocation of tax revenues. CRA reasons that the section 95.3 "revenues allocated to the County cannot also be allocated to the Agency." Added to this argument is the statement that "The *726 Applicable Statutory Provisions Are Clear." CRA argues then that the deductions should not reduce the total amount of tax revenue increment that the allocation limitations allow and that is actually paid to CRA.

The problem with this argument is that subdivision (b)(1) of section 95.3 expressly states: "Each proportionate share of property tax administrative costs determined pursuant to subdivision (a) ... ***shall be deducted*** from the property tax revenue allocation of the ... community redevelopment agency, and shall be added to the property tax revenue allocation of the county...." (Bold italics added.) On its face, County's procedure is exactly that prescribed in subdivision (b)(1). It is CRA's revenue allocation that is diminished, not County's. This conclusion is bolstered by the legislative intent language in subdivision (e) of section 95.3 that "this section is intended to fairly apportion the burden of collecting property tax revenues." Any other interpretation of

section 95.3 would allow a redevelopment agency, especially where allocation limitations are in effect, to avoid or shift the burden to other agencies or to County.

CRA seeks support for its argument by relying on the Legislature's statement in subdivision (e) of section 95.3 that the section "is not a reallocation of property tax revenue shares" We agree with County that such ambiguity as may seem to exist in section 95.3 is reconciled by the Legislature's repeated reference to the PTAF as a "charge" rather than as a tax revenue allocation. For example, in subdivision (d) of section 95.3, the statute specifies that PTAF "shall constitute charges for those services" of "assessing, equalizing, and collecting property taxes" on behalf of the other taxing agencies. Moreover, if the PTAF were merely an allocation of tax revenue to County, rather than to the taxing agencies, no purpose would be served by subdivision (d)'s limitation that this revenue "shall be used only to fund costs incurred by the county in assessing, equalizing, and collecting property taxes, and in allocating property tax revenues"

The PTAF was initially promulgated in 1990 as part of Senate Bill No. 2557 (1989-1990 Reg. Sess.) (Stats. 1990, ch. 466, § 4, pp. 2043-2045). Both sides and the trial court have referred to Senator Kenneth L. Maddy's letter dated August 31, 1990, respecting the purposes of the bill. With reference to the PTAF, Senator Maddy, as author of the bill and as the state Senate's Republican floor leader, wrote: "Section 4 of the bill authorizes counties to charge a fee to other local jurisdictions for the actual costs of administration of the property tax system [¶] It also was the intent that the fees for cities, redevelopment agencies, and special districts be withheld from the respective shares of the property tax of each of these entities." With *727 this pronouncement in mind, the only reasonable interpretation of section 95.3 is that the PTAF is a charge against revenue allocations and was intended to reduce the shares of tax revenue allocated to the local entities.

For its contention that the PTAF deduction should not diminish its revenue allocation (and thus cause the allocation limitations to bar payment of additional increment sooner), CRA relies upon an opinion of the California Attorney General, 76 Ops.Cal.Atty.Gen. 137 (1993). CRA's reliance is misplaced. (2) An opinion of the Attorney General "is not a mere 'advisory' opinion, but a statement which, although not binding on the judiciary, must be 'regarded as

having a quasi judicial character and [is] entitled to great respect,' and given great weight by the courts. (People v. Shearer (1866) 30 Cal. 645, 652; Montessori Schoolhouse of Orange County, Inc. v. Department of Social Services (1981) 120 Cal.App.3d 248, 259 [175 Cal.Rptr. 14].)" (Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal.App.3d 245, 263 [226 Cal.Rptr. 361].) Whether or not binding on this Court, the opinion cited by CRA does not interpret section 95.3 but rather deals with payments the redevelopment agency may be obligated to make to other governmental entities. Moreover, a careful scrutiny of the opinion reveals that it tends to support the statutory interpretation that the trial court made.

For example, the opinion examines the legislative requirement of a "20 percent set-aside" for low and moderate-income housing. (See Health & Saf. Code, § 33334.2.) The opinion concludes that a redevelopment agency must calculate this 20 percent set-aside "based upon the total tax increment revenues allocated to the agency—irrespective of any subsequent transfers made by the agency to other public entities." (76 Ops.Cal.Atty.Gen., *supra*, at p. 144.) The opinion is based on the plain meaning of the statutes involved in concert with the stated legislative intent. The trial court's—and our—interpretation is likewise based on the plain meaning of section 95.3, supported by evident legislative intent.

CRA's slant on the Attorney General's opinion is not supportive of CRA's position in other respects. The opinion holds that the applicable statutes require that " 'all' taxes allocated to a redevelopment agency ... are to serve as the amount upon which the 20 percent set-aside is calculated.... The statute [i.e., Health and Safety Code section 33334.2] contains no explicit or implicit exception for funds transferred by a redevelopment agency to other public entities." (76 Ops.Cal.Atty.Gen., *supra*, at p. 140.) The opinion holds that the 20 percent set-aside must be applied to the entire allocation even though the allocated revenues are also subject to " 'pass-through agreements' " and other obligations. (*Id.* at p. 138.) Thus, the *728 set-aside amounts must be derived from the gross tax revenue allocated to the agency.

In reaching its ultimate conclusion, the opinion necessarily deals with four other related Health and Safety Code provisions. Concerning section 33401, the opinion holds that it "does not alter the amount of tax increment funds to be allocated to a redevelopment agency" because the statute does not

"allow[] tax increment revenues to bypass a redevelopment agency." (76 Ops.Cal.Atty.Gen., *supra*, at p. 141.) The statute authorizes a redevelopment agency to "pay directly" to "school districts" and other public corporations or governmental districts an amount of money equivalent to the tax revenue the agency would have received on tax exempt property owned by the agency in the project area had that property been taxed. The payments are "passed-through" directly from the tax revenue funds the agency receives as its tax revenue allocation. As with the low-income housing set-aside, this "pass-through" money is deducted from the total amount of tax revenue the agency receives.

Health and Safety Code section 33446 has a purpose similar to that of section 33401 in that it benefits school districts. Section 33446 allows the redevelopment agency to construct buildings for use by a school district with title eventually vesting in the district. But instead of tax revenue funds "passing-through" to the school district, the agency directly expends its redevelopment funds for construction. The Attorney General's opinion observes: "Unquestionably the revenues involved in the expenditure have already been allocated to the redevelopment agency under the terms of section 33670 and are therefore subject to the 20 percent set-aside provision of section 33334.2." (76 Ops.Cal.Atty.Gen., *supra*, at p. 142.) [FN2]

FN2 In passing, we note that a redevelopment agency's school construction expenditures may in fact be paid from its financing (e.g., government guaranteed bonds), rather than from its tax revenue allocations. Nonetheless, in paying off the bonds with its tax increment, the agency ultimately pays for the school construction from its allocations.

The Attorney General's opinion lastly analyzes Health and Safety Code section 33676. But the opinion concludes that this provision differs from the other four. The opinion states that section 33676 "has the effect of directly allocating to other public entities certain portions of the tax revenues that would ordinarily be allocated to a redevelopment agency" and these revenue funds, "unlike those subject to pass-through agreements, do in fact bypass the redevelopment agency through the allocation procedure." (76 Ops.Cal.Atty.Gen., *supra*, at p. 143.)

(1b) In summary, the Attorney General's opinion

shows that the Legislature in plain language requires that set-aside and pass-through funding that *729 a redevelopment agency provides to benefit school districts and other public entities to offset some of the consequences of redevelopment are drawn from the tax revenue allocated to the agency. We see no significance in the fact that the redevelopment agency, rather than the taxing agency, actually deducts the funds from the allocation. The result is the same in either case: a diminution of the amount of funds the redevelopment agency has to apply to the project's other financial obligations.

The plain language of the statute here permits County to deduct the PTAF from CRA's tax increment allocation and is in harmony with the legislative intent to allow counties to cover their administrative costs. To follow CRA's interpretation of section 95.3 would allow redevelopment agencies with capped plans to avoid those costs. If the deduction did not reduce the capped allocation, CRA would in essence, under the circumstances pertinent here, recover its PTAF payments in the year it reached the cap limit. Moreover, this recovery would be at the expense of other local entities.

CRA also attempts to bolster its contention that section 95.3 is a reallocation, as opposed to the collection of the PTAF as a charge, by reference to the language of the California Constitution. Section 16, subdivision (b), of article XVI, to which CRA refers, does provide that the tax revenue increment from a redevelopment plan area "shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency" CRA grasps this provision to contend at least implicitly that any interpretation of section 95.3 that permits the PTAF to be deducted from CRA's revenue allocation violates the constitution. This contention is without merit and attempts to resurrect a claim previously rejected by another division of this Court.

In Arcadia Redevelopment Agency v. Ikemoto (1993) 16 Cal.App.4th 444 [20 Cal.Rptr.2d 112], a redevelopment agency challenged the imposition of the PTAF as to redevelopment agencies as presented by chapter 466 of Statutes 1990. The agency claimed that it was impermissible to reduce the agency's tax revenue receipts because the California Constitution—specifically article XVI, section 16—protected this funding, rendering it mandatory. (Arcadia Redevelopment Agency v. Ikemoto, supra, 16 Cal.App.4th at pp. 448-451.) Division Three of this district of the Court of Appeal rejected the contention and found that section 16 of article XVI "does not

prevent the Legislature from altering the levying and collection of taxation on redevelopment project property in a manner consistent with which it alters the levying and collection of taxation on other property." (16 Cal.App.4th at p. 452.) Whether a redevelopment agency's tax revenues are reduced by a *730 proper alteration of the levy and collection of taxes or by a charge for administrative costs, the principle is the same. The Legislature is so empowered as long as it acts with an even hand. Thus, Division Three upheld the statute against the constitutional challenge. (*Id.* at p. 446.) We explicitly approve and adopt the rationale of the *Arcadia* opinion.

In addition, we observe that the language in section 16 of article XVI of the California Constitution that the tax revenue "shall be allocated to and when collected shall be paid" to the redevelopment agency is not inconsistent with section 95.3. A redevelopment agency ultimately pays all of its financial obligations from its tax revenue allocations. The PTAF is a proper obligation and payable to the county administering and collecting the taxes. Whether deducted up front or paid upon presentment of an invoice, the effect should be the same: the agency's tax revenue income is reduced by the deduction or payment.

The remainder of CRA's arguments focus on the purposes and intentions of the Legislature. In the main, these arguments stress the lack of legislative intent evidence respecting other statutes related to tax revenue allocation for redevelopment plans. Reduced to its essentials, CRA argues that there was no legislative intent that the PTAF should reduce the allocations of capped plans. Resort to the absence of legislative intent material is not helpful and does not demonstrate the proposition CRA urges. Here, section 95.3 proclaims that the PTAF is to "be deducted from the property tax revenue allocation of the ... community redevelopment agency." (Subd. (b)(1).) The statute further states that the PTAF "shall constitute charges for those services" (subd. (d)) and that it "is intended to fairly apportion the burden of collecting property tax revenues." (Subd. (e).) In this complex area of property tax and redevelopment finance, clearer statements of procedure and purpose would be difficult to achieve. Because the statute is sufficiently clear in method and intent and because County's implementation does not conflict with the process and procedure set forth in section 95.3, we uphold the trial court's determination.

Disposition

The judgment is affirmed.

Cooper, J., and Doi Todd, J., concurred. *731

Cal.App.2.Dist.,2001.

COMMUNITY REDEVELOPMENT AGENCY OF
THE CITY OF LOS ANGELES, Plaintiff and
Appellant, v. COUNTY OF LOS ANGELES et al.,
Defendants and Respondents.

END OF DOCUMENT

▷ COUNTY OF LOS ANGELES, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; TERRELL R., Real Party in Interest.

Cal.App.2.Dist.

COUNTY OF LOS ANGELES, Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; TERRELL R., Real Party in Interest.

No. B157850.

Court of Appeal, Second District, Division 5,
California.

Sept. 30, 2002.

SUMMARY

A minor sued a county and others after the child was placed in a foster family home in which he was sexually molested. The complaint alleged causes of action against the county for violation of mandatory statutory duties (Gov. Code, § 815.6) and negligence. The county moved for summary judgment on several grounds, including the defense that it was immune from suit. The trial court denied the county's motion. (Superior Court of Los Angeles County, No. BC235677, Marvin Lager, Judge.)

The Court of Appeal granted the county's petition for a writ of mandate, and ordered the trial court to vacate its denial of the county's motion for summary judgment, to enter a new order granting the motion, and to enter judgment in favor of the county. The court held that the child was unable to establish, for purposes of pleading a cause of action under Gov. Code, § 815.6, that specified statutes and a regulation created a mandatory duty on the part of the county to place foster children with relatives or siblings. Although the statutes and the regulation all provided that preferential consideration should be given to placing the child in the home of a relative when possible, such a preference was merely a legislative goal or policy; it did not create a mandatory duty. Foster care placement involves the exercise of discretion. Also, the purpose of the statutes and regulation was to preserve the family relationship, not to prevent sexual abuse. Moreover, no relatives of the child were available for placement.

The court also held that the child was unable to establish that specified department of social services manual regulations created a mandatory duty on the part of the county to place foster children in an appropriate environment and monitor the children's condition. The court further held that the child was unable to establish derivative liability for acts or omissions of county employees under Gov. Code, § 815.2. The court also held that the child was unable to establish liability based on the county social worker's failure to supervise him, or based on the fact that the social worker knew the foster parent had completed only 15 hours of the 30 hours of training required by the foster family agency for certification. (Opinion by Grignon, J., with Turner, P. J., and Armstrong, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Summary Judgment § 26--Appellate Review--Standard of Review.

The appellate court reviews orders granting or denying a summary judgment motion de novo. The appellate court exercises an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.

(2) Government Tort Liability § 2--As Governed by Statute.

In California, all government tort liability must be based on statute. Gov. Code, § 815, abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or state Constitution. Thus, in the absence of some constitutional requirement, public entities may be liable only if a statute declares them to be liable.

(Cite as: 102 Cal.App.4th 627)

(3) Government Tort Liability § 3.2--Grounds for Relief--Mandatory Duty-- Enactment--Regulation--Definitions.

The term "enactment" as used in Gov. Code, § 815.6 (imposition of liability on government agency for failure to discharge mandatory duty imposed by enactment), means a constitutional provision, statute, charter provision, ordinance or regulation (Gov. Code, § 810.6). This definition is intended to refer to all measures of a formal legislative or quasi-legislative nature. The term "regulation," as used in Gov. Code, § 810.6, means a rule, regulation, order or standard, having the force of law, adopted as a regulation by an agency of the state pursuant to the Administrative Procedure Act. That act's rulemaking provisions apply to most state agencies and their regulations. There are significant exceptions, however, both as to the agencies and types of regulations covered. The act does not apply to a regulation that relates only to the internal management of the state agency or a regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state. Thus, an employee manual of a county-operated juvenile dependency facility is not an enactment that imposes a mandatory duty on county employees.

(4) Government Tort Liability § 24--Actions--Pleading--Failure to Discharge Mandatory Duty--Specific Statutory Duty.

To state a cause of action for government tort liability for failure to discharge a mandatory duty, one of the essential elements that must be pleaded is the existence of a specific statutory duty. Duty cannot be alleged simply by stating "defendant had a duty under the law"; that is a conclusion of law, not an allegation of fact. The facts showing the existence of the claimed duty must be alleged. Since the duty of a governmental agency can only be created by a statute or enactment, the statute or enactment claimed to establish the duty must at the very least be identified. Therefore, a litigant seeking to plead the breach of a mandatory duty must specifically allege the applicable statute or regulation; otherwise a court cannot determine whether the enactment was intended to impose an obligatory duty to take official action or whether it was merely advisory in character.

(5) Government Tort Liability § 3.2--Grounds for Relief--Mandatory Duty-- Test for Determining Liability.

Gov. Code, § 815.6 (imposition of liability on government agency for failure to discharge mandatory duty imposed by enactment), contains a

three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not a discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting § 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered. Whether an enactment is intended to impose a mandatory duty is a question of law for the court.

(6) Government Tort Liability § 3.2--Grounds for Relief--Mandatory Duty-- Obligatory Enactment.

The application of Gov. Code, § 815.6 (imposition of liability on government agency for failure to discharge mandatory duty imposed by enactment), requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity. The enactment must require, rather than merely authorize or permit, that a particular action be taken or not taken. It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. It also requires that the mandatory duty be designed to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is one of the consequences that the enacting body sought to prevent through imposing the alleged mandatory duty. The inquiry in this regard goes to the legislative purpose of imposing the duty. That the enactment confers some benefit on the class to which plaintiff belongs is not enough; if the benefit is incidental to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under Gov. Code, § 815.6. An enactment creates a mandatory duty if it requires a public agency to take a particular action. An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion. The use of the word "shall" in an enactment does not necessarily create a mandatory duty.

(7) Government Tort Liability § 3.2--Grounds for Relief--Mandatory Duty-- Placement of Foster Child with Relatives or Siblings.

In an action by a dependent child of the court, alleging that a county breached mandatory duties by placing him in a foster home in which he was sexually molested, the child was unable to establish, for purposes of pleading a cause of action under Gov. Code, § 815.6 (imposition of liability on government agency for failure to discharge mandatory duty

imposed by enactment), that specified statutes and a regulation created a mandatory duty on the part of the county to place foster children with relatives or siblings. Although Fam. Code, § 7950, subd. (a)(1), Welf. & Inst. Code, § 16501.1, subd. (c), Welf. & Inst. Code, § 16000, and a department of social services manual regulation all provided that preferential consideration should be given to placing the child in the home of a relative when possible, such a preference was merely a legislative goal or policy; it did not create a mandatory duty. Foster care placement is a governmental function that involves the exercise of discretion. In addition, the purpose of the statutes and regulation was to preserve the family relationship, not to prevent sexual abuse. Moreover, no relatives of the child were available for placement. Similarly, Welf. & Inst. Code, § 16002, subd. (b), provides that the responsible local agency shall make a diligent effort to develop and maintain sibling relationships, but that statute did not create a mandatory duty.

(8) Government Tort Liability § 3.2--Grounds for Relief--Mandatory Duty-- Placement of Foster Child in Appropriate Environment.

In an action by a dependent child of the court, alleging that a county breached mandatory duties by placing him in a foster home in which he was sexually molested, the child was unable to establish, for purposes of pleading a cause of action under Gov. Code, § 815.6 (imposition of liability on government agency for failure to discharge mandatory duty imposed by enactment), that specified department of social services manual regulations created a mandatory duty on the part of the county to place foster children in an appropriate environment and monitor the children's condition. The regulations set forth general policy goals, but did not specifically direct the manner in which the goals would be attained. They created no mandatory duty, and their purpose was not to prevent sexual abuse. Placement and supervision are functions involving the exercise of discretion. A county is not the insurer of a child's physical and emotional condition, growth and development while in foster care placement.

(9) Government Tort Liability § 5--Grounds for Relief--As Dependent on Liability of Employees--Derivative Liability.

Gov. Code, § 815.2, imposes upon public entities vicarious liability for the tortious acts and omissions of their employees, and makes it clear that in the absence of statute a public entity cannot be held liable for an employee's act or omission where the employee himself or herself would be immune.

Identification of a specific employee tortfeasor is not essential to liability under Gov. Code, § 815.2.

(10) Government Tort Liability § 5--Grounds for Relief--As Dependent on Liability of Employees--Derivative Liability--Discretionary Activities--Placement of Minor in Foster Care.

In an action by a dependent child of the court, alleging that a county was liable for placing him in a foster home in which he was sexually molested, the child was unable to establish derivative liability for acts or omissions of county employees under Gov. Code, § 815.2. Gov. Code, § 820.2, provides that a public employee is not liable for an injury resulting from his or her act or omission where the act or omission was the result of the exercise of the discretion vested in the employee, whether or not such discretion is abused. The determination to place a child in a particular foster family home is immune from liability pursuant to Gov. Code, § 820.2. The choice of a foster family home for a dependent child is a complex task requiring the consideration and balancing of many factors to achieve statutory objectives. Selecting and certifying a foster family home for care of dependent children are an activity with many subjective determinations and is fraught with major possibilities of an erroneous decision. Foster family home placement constitutes an activity of a co-equal branch of government, and the discretionary decisions made in connection therewith should be deemed beyond the proper scope of court review. A county social worker is immune from liability for negligent supervision of a foster child unless the social worker fails to provide specific services mandated by statute or regulation.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 247 et seq.; West's Key Number Digest, Infants 17.]

(11) Government Tort Liability § 5--Grounds for Relief--As Dependent on Liability of Employees--Discretionary Activities--Failure to Supervise Minor Placed in Foster Care Home.

In an action by a dependent child of the court, alleging that a county was liable for placing him in a foster home in which he was sexually molested, the child was unable to establish liability based on the county social worker's failure to supervise him. The evidence was undisputed that the county social worker complied with the visitation schedule mandated by the regulations. In addition, the child was placed with a licensed foster family agency; a social worker from that agency visited the child in his foster family home two or three times a month. The foster family agency social worker reported that the child had his own bedroom. The child never

disclosed to either the county or the foster family agency social workers, during these visits, the improprieties or sexual abuse that took place. The child appeared to the social workers to be content in a stable placement. The appropriate degree of supervision of a foster parent, in excess of the visitation schedule mandated by statute or regulation, is a uniquely discretionary activity for which the county social worker and the county were immune.

(12) Government Tort Liability § 5--Grounds for Relief--As Dependent on Liability of Employees--Placement of Minor with Certified Foster Parent--Relaxation of Training Requirements.

In an action by a dependent child of the court, alleging that a county was liable for placing him in a foster home in which he was sexually molested, the child was unable to establish liability, notwithstanding that the county social worker knew the foster parent had completed only 15 hours of the 30 hours of training required by the foster family agency for certification. The county social worker had a ministerial duty to place the child with a licensed foster family agency for placement in a certified foster family home. The agency was a licensed foster family agency, and it certified the residence as a foster family home. The county social worker placed the child with the foster family agency for placement in the residence. Thus, the county social worker complied with her ministerial duty. It was the duty of the foster family agency to certify the residence as a foster family home in compliance with its license with the state and its contract with the County. Although the agency relaxed the training requirement, the evidence was undisputed that the reason for the relaxation was to expedite the certification of the residence in order to facilitate the placement of the child with a family friend. There was no evidence of any improper purpose or motivation. The knowledge of the county social worker of the relaxation of the training requirements under these circumstances could not reasonably be construed as knowledge that the certification was a sham.

COUNSEL

Schuler & Kessel, Elizabeth M. Kessel and Linda Diane Anderson for Petitioner.

No appearance for Respondent.

Voorhies & Kramer, Richard C. Voorhies, R. Brian Kramer; and Linda Wallace Pate for Real Party in Interest.

GRIGNON, J.

Defendant County of Los Angeles (County) petitions

for a writ of mandate ordering respondent court to grant its motion for summary judgment of the action brought against it by real party in interest Terrell R. This case arises out of Terrell's dependency placement in a foster family home in which he was sexually molested. He alleged the County breached mandatory duties causing his injuries. We conclude no triable issue of fact exists as to the breach of any mandatory duty by the County causing Terrell injury. He further alleged the County was responsible under the doctrine of respondeat superior for the negligence of its social worker. We conclude the social worker and the County are immune for the discretionary acts of the social worker in placing and supervising Terrell. Accordingly, we grant the petition and order respondent court to grant the motion for summary judgment and enter judgment in favor of the County.

Facts and Procedural Background ^{FN1}

Facts

Terrell was born in April 1988. Terrell and his four siblings were declared dependents of the court and removed from the custody of their mother in *634 November 1996. The children were placed with the maternal grandmother and her husband. In January 1999, the maternal grandmother was appointed guardian of the children. In early March 1999, the County Department of Children and Family Services detained the children and removed them from their maternal grandmother's custody due to her failure to provide for them and her abuse of prescription drugs. The children were permitted to remain in the home with the maternal grandmother's husband, provided the maternal grandmother did not live in the home.

FN1 This appeal is from a summary judgment. The relevant facts are largely undisputed. To the extent conflicting evidence exists, we state the facts in the light most favorable to the party opposing the summary judgment motion, i.e., Terrell.

On March 8, 1999, Robert Poole contacted the County social worker assigned to the children. Robert Poole told the County social worker he was a family friend interested in becoming a caregiver for the children and asked about the procedure. The County social worker advised Robert Poole to contact a state licensed foster family agency to inquire about becoming a certified foster parent. Robert Poole

contacted Wings of Refuge, a state licensed foster family agency, and began attending Model Approach for Partnership in Parenting (MAPP) classes.

On March 31, 1999, the maternal grandmother returned to the home. An immediate and temporary placement for the five children was required.

By April 1, 1999, Wings of Refuge had certified Robert Poole as a foster parent. He did not have a criminal record. However, a child abuse index clearance, the results of a TB test, and verification of employment had not been completed prior to the certification of Robert Poole as a foster parent. Satisfactory responses were obtained only thereafter. Prior to certification, Robert Poole had not completed the 30 hours of MAPP classes required by Wings of Refuge's license with the state; he had completed only 15 hours. The County social worker was aware of this fact. In March 1999, no state regulation required the completion of training prior to certification of an individual as a foster parent. Subsequently, a regulation was adopted requiring 12 hours of training prior to certification. (Cal. Code Regs., tit. 22, § 89405.) However, the program statement filed by Wings of Refuge with the state indicated an individual certified by Wings of Refuge as a foster parent would have completed 30 hours of MAPP training.

At the time Robert Poole was certified as a foster parent, he was living with his mother, Monica Poole, in a three-bedroom house in Inglewood. Wings of Refuge inspected the Poole residence, completed a home study, and certified the residence as a foster family home. The Poole residence was certified by Wings of Refuge to take only one of the children until Robert Poole could obtain a larger home. Terrell was placed with Robert Poole. As of May 5, 1999, his four siblings were placed together in a different foster *635 family home; the siblings' foster parent was working towards qualifying to take Terrell as a fifth child. No relatives were currently available for placement, although a maternal aunt was interested if she could obtain a larger residence. Other relatives were also contacted.

On April 5, 1999, the dependency court ordered the children detained and removed from the custody of the maternal grandmother. On June 9, 1999, the allegations of a supplemental petition against the maternal grandmother were sustained.

The County social worker met with all five children and Robert Poole at the offices of Wings of Refuge

on April 1, 1999, and at the siblings' foster family home on May 25 and June 10, 1999. This satisfied the County's mandatory duty to conduct face-to-face visits each calendar month under the state Department of Social Services Manual of Policies and Procedures (DSS Manual) regulation 31-320.41.

A Wings of Refuge social worker visited Terrell in the Poole home on April 1, April 27, May 6, May 18, June 8, June 15, and June 22, 1999. Terrell had his own bedroom.

Terrell had been sleeping in the same bed as Robert Poole since the beginning of his placement in the Poole home. Terrell was sexually abused by Robert Poole between April 1 and June 30, 1999. The Wings of Refuge social worker first received information of the bed sharing and possible sexual abuse of Terrell by Robert Poole on June 28, 1999. The Wings of Refuge social worker called the child abuse hotline on June 29, 1999. Terrell was removed from the Poole home on that same date. The County social worker did not know until July 5, 1999, that Terrell was sleeping in the same bed as Robert Poole or that Robert Poole was sexually molesting Terrell.

Criminal charges were filed against Robert Poole for the sexual molestation of Terrell. Robert Poole was acquitted.

Allegations of the Complaint

On August 23, 2000, Terrell sued Robert Poole, Monica Poole, the County, and Wings of Refuge. The complaint alleged causes of action against the County for violation of mandatory statutory duties (Gov. Code, § 815.6) and negligence, arising out of the County's placement of Terrell in the Poole home and supervision of Terrell thereafter. Specifically, the complaint listed various statutes and regulations alleged to have created mandatory duties on the part of the County, which the County had breached *636 in its placement and supervision of Terrell. Terrell's action for negligence against the County stated facts alleging both direct liability and vicarious liability for the actions of its unnamed employees under the doctrine of respondeat superior.

Terrell also sued Wings of Refuge for negligence; Robert Poole for negligence, assault and battery, and intentional infliction of emotional distress; Dependency Court Legal Services for legal malpractice; and Monica Poole for negligence.

County's Motion for Summary Judgment

The County moved for summary judgment on the grounds it was immune from suit unless it breached a mandatory statutory duty, it breached no mandatory statutory duty owed to Terrell, and any breach did not cause Terrell damage.^{FN2} The County also moved for summary judgment on the ground that any negligence of its employees had been the result of the exercise of discretion and therefore the County was also immune from suit on this basis. Terrell opposed the motion. The County replied to the opposition.

FN2 Respondent court did not rule on Terrell's objections to the County's evidence. Accordingly, those objections have been waived. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1[25 Cal.Rptr.2d 137, 863 P.2d 207].) Moreover, to the extent the objections are raised on appeal, they are not supported by adequate citations to the record or statutory or case authority. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979[21 Cal.Rptr.2d 834].) In addition, to the extent the evidence consisted of an expert opinion, neither this court nor the trial court relied on the expert opinion. Finally, the County's evidence consisted primarily of admissible records from the dependency court proceedings. We note that these records were attached by Terrell to the deposition of the County social worker submitted to the trial court.

November 2, 2001 Hearing

The hearing on the summary judgment motion was scheduled for November 2, 2001. On that date, the trial court requested that the parties pinpoint the precise mandatory duties that the County had allegedly violated. The hearing was continued to March 21, 2002.

March 21, 2002 Hearing

Plaintiff identified the following statutes and regulations assertedly giving rise to a mandatory duty on the part of the County: Family Code section 7950, subdivision (a)(1); Welfare and Institutions Code sections 16501, subdivision (c), 16501.1, subdivision (c), 16000, and 16002, subdivision (b); and DSS Manual regulations 31-301.21, 31-405.1(j), 31-420.1,

and 31-420.2. Respondent court concluded a triable issue of fact existed as to *637 whether the County social worker knew that 30 hours of MAPP classes were required prior to certification of a foster parent and knew Robert Poole had completed only 15 hours. From this, respondent court inferred the County social worker might have known that the certification of Robert Poole as a foster parent by Wings of Refuge was a sham. The County social worker had a ministerial duty to place Terrell in a certified foster family home and thus under the doctrine of respondeat superior, the County was liable for the breach of that ministerial duty. Respondent court denied the County's motion for summary judgment. This timely petition followed.

Discussion

Standard of Review

(1) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72[41 Cal.Rptr.2d 404]; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581[37 Cal.Rptr.2d 653].) We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222[38 Cal.Rptr.2d 35].) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850[107 Cal.Rptr.2d 841, 24 P.3d 493].)

Immunity of County

(2) "In California, all government tort liability must be based on statute. Government Code section 815 provides: 'Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.' (Gov. Code, § 815, subd. (a).) ... [T]his section 'abolished all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the federal or

state Constitution. Thus, in the absence of some constitutional requirement, public entities may be liable *only* if a statute declares them to be liable." " (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1457[81 Cal.Rptr.2d 165].)

Mandatory Duty-Direct Liability

A public entity may be directly liable for failure to discharge a mandatory duty. (Gov. Code, § 815.6) Government Code 815.6 provides: "Where a *638 public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

(3) "The term 'enactment' as used in Government Code section 815.6 means 'a constitutional provision, statute, charter provision, ordinance or regulation.' (Gov. Code, § 810.6.) 'This definition is intended to refer to all measures of a formal legislative or quasi-legislative nature.' [Citation.] The term 'regulation,' as used in Government Code section 810.6 means 'a rule, regulation, order or standard, having the force of law, adopted ... as a regulation by an agency of the state pursuant to the Administrative Procedure Act [Act].' [Citation.] [¶] 'The ... Act rulemaking provisions apply to *most state agencies* and their regulations. [Citations.] There are significant exceptions, however, both as to the agencies and types of regulations covered. [Citation.] [Citations.] For instance, the Act does not apply to '[a] regulation that relates only to the internal management of the state agency' or '[a] regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.' " (*Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 982[111 Cal.Rptr.2d 173].) An employee manual of a county-operated juvenile dependency facility is not an enactment that imposes a mandatory duty on county employees. (*Ibid.*)

(4) "One of the essential elements that must be pled is the existence of a specific statutory duty. [Citation.] 'Duty cannot be alleged simply by stating "defendant had a duty under the law"; that is a conclusion of law, not an allegation of fact. The facts showing the existence of the claimed duty must be alleged. [Citation.] Since the duty of a governmental agency can only be created by statute or "enactment," the statute or "enactment" claimed to establish the

duty must at the very least be identified.' [Citation.] Therefore, a "... litigant seeking to plead the breach of a mandatory duty must specifically allege the applicable statute or regulation." [Citation.] ' Unless the applicable enactment is alleged in specific terms, a court cannot determine whether the enactment relied upon was intended to impose an obligatory duty to take official action to prevent foreseeable injuries or whether it was merely advisory in character.' " (*Becerra v. County of Santa Cruz, supra*, 68 Cal.App.4th at p. 1458.)

(5) " 'Government Code [section] 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty ...; (2) the *639 enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability ...; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered.' [Citation.] Whether an enactment is intended to impose a mandatory duty is a question of law for the court." (*Becerra v. County of Santa Cruz, supra*, 68 Cal.App.4th at p. 1458.)

(6) As our Supreme Court has explained, "First and foremost, application of [Government Code] section 815.6 requires that the enactment at issue be *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. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. " (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498[93 Cal.Rptr.2d 327, 993 P.2d 983].)

"Second, but equally important, [Government Code] section 815.6 requires that the mandatory duty be 'designed' to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is "one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty." [Citation.] Our inquiry in this regard goes to the legislative *purpose* of imposing the duty. That the enactment 'confers some benefit' on the class to which plaintiff belongs is not enough; if the benefit is 'incidental' to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under [Government Code] section 815.6." (*Haggis v. City of Los Angeles, supra*, 22 Cal.4th at p. 499.)

An enactment creates a mandatory duty if it requires a public agency to take a particular action. (*Wilson v. County of San Diego*, *supra*, 91 Cal.App.4th at p. 980.) An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion. (*Ibid.*) The use of the word "shall" in an enactment does not necessarily create a mandatory duty. (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 910-911, fn. 6[136 Cal.Rptr. 251, 559 P.2d 606]; *Wilson v. County of San Diego*, *supra*, 91 Cal.App.4th at p. 980.)

Statutes and Regulations

(7) Terrell claims the following statutes and regulations create mandatory duties on the part of the County. *640

1. Relative and sibling placement.

Terrell argues Family Code section 7950, subdivision (a)(1), Welfare and Institutions Code sections 16501.1, subdivision (c), 16000, 16002, subdivision (b), and DSS Manual regulation 31-420.2 require that a foster child be placed with a relative and siblings. We address each of these enactments.

A. Family Code section 7950, subdivision (a)(1) provides: "With full consideration for the proximity of the natural parents to the placement so as to facilitate visitation and family reunification, when a placement in foster care is being made, the following considerations shall be used: [¶] ... Placement shall, if possible, be made in the home of a relative, unless the placement would not be in the best interest of the child. Diligent efforts shall be made to locate an appropriate relative. Before any child may be placed in long-term foster care, each relative whose name has been submitted to the agency as a possible caretaker, either by himself or herself or by other persons, shall be evaluated as an appropriate placement resource."

Family Code section 7950 "concerns priorities for foster care placement." (*Becerra v. County of Santa Cruz*, *supra*, 68 Cal.App.4th at p. 1459.) This legislative preference for placement in the home of a relative is merely a legislative goal or policy that must be implemented by the County in the exercise of its judgment as to an appropriate foster care placement; it does not create a mandatory duty. (*Wilson v. County of San Diego*, *supra*, 91

Cal.App.4th at p. 980.) Foster care placement is a governmental function that involves the exercise of discretion. In addition, the purpose of the statute is to preserve the family relationship, not to prevent sexual abuse. Moreover, the evidence is undisputed that no relatives of Terrell were available for placement.

B. Welfare and Institutions Code section 16501.1, subdivision (c) provides: "When out-of-home placement is used to attain case plan goals, the decision regarding choice of placement shall be based upon selection of a safe setting that is the least restrictive or most family-like and the most appropriate setting that is available and in close proximity to the parent's home, consistent with the selection of the environment best suited to meet the child's special needs and best interest, or both. The selection shall consider, in order of priority, placement with relatives, tribal members, and foster family, group care, and residential treatment pursuant to Section 7950 of the Family Code."

"[Welfare and Institutions Code s]ection 16501.1 requires [Child Protective Services] social workers to analyze the selection criteria prior to placement of the child. The statute does not, however, specify the ultimate *641 placement that must be made, or dictate that any one factor is controlling. Although the statute provides a general policy statement by which social workers are to be guided, it does not require a particular result, or specify the 'special needs' or 'best interests' of the child. These factors, sometimes difficult and subjective, are left to the judgment of the social worker placing the child. [¶] ... [T]o the extent that there is a 'mandatory duty' imposed upon the County by Welfare and Institutions Code section 16501.1, subdivision (c), it is to evaluate the stated criteria prior to making a placement selection." (*Becerra v. County of Santa Cruz*, *supra*, 68 Cal.App.4th at pp. 1459-1460.) Welfare and Institutions Code section 16501.1, subdivision (c) is, like Family Code section 7950, concerned with priorities for discretionary foster care placement; it creates no mandatory duties. (*Becerra*, at p. 1459.) Similarly, it does not have a purpose to prevent sexual abuse and no relatives were available for placement.

C. Welfare and Institutions Code section 16000 provides: "It is the intent of the Legislature to preserve and strengthen a child's family ties whenever possible, removing the child from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. In any case in which a child is removed

from the physical custody of his or her parents, preferential consideration shall be given whenever possible to the placement of the child with the relative as required by Section 7950 of the Family Code. When the child is removed from his or her own family, it is the purpose of this chapter to secure as nearly as possible for the child the custody, care, and discipline equivalent to that which should have been given to the child by his or her parents. It is further the intent of the Legislature to reaffirm its commitment to children who are in out-of-home placement to live in the least restrictive, most family-like setting and to live as close to the child's family as possible pursuant to subdivision (c) of Section 16501.1. Family reunification services shall be provided for expeditious reunification of the child with his or her family, as required by law. If reunification is not possible or likely, a permanent alternative shall be developed."

Welfare and Institutions Code section 16000 is another statute setting forth legislative priorities for discretionary foster care placement; it creates no mandatory duties. (*Becerra v. County of Santa Cruz*, *supra*, 68 Cal.App.4th at p. 1459.) Similarly, its purpose is not to prevent sexual abuse and no relatives were available for placement.

D. Welfare and Institutions Code section 16002, subdivision (b) provides: "The responsible local agency shall make a diligent effort in all out-of-home placements of dependent children, including those with relatives, to develop and maintain sibling relationships. If siblings are not placed *642 together in the same home, the social worker shall explain why the siblings are not placed together and what efforts he or she is making to place the siblings together or why those efforts are not appropriate. When placement of siblings together in the same home is not possible, diligent effort shall be made, and a case plan prepared, to provide for ongoing and frequent interaction among siblings until family reunification is achieved, or, if parental rights are terminated, as part of developing the permanent plan for the child. If the court determines by clear and convincing evidence that sibling interaction is detrimental to a child or children, the reasons for the determination shall be noted in the court order, and interaction shall be suspended."

As with relative placement, placement with siblings is a legislative goal that does not create a mandatory duty. It is a factor to be considered in making the discretionary foster care placement. Moreover, its purpose is to preserve familial relationships and not

to prevent sexual abuse. Further, the evidence is undisputed that a placement for all five siblings was not available at the time.

E. DSS Manual regulation 31-420.2 provides in relevant part: "When selecting a foster care placement for the child, the social worker shall adhere to the following priority order: [¶] .21 The home of a relative, including the non-custodial parent, in which the child can be safely placed as assessed according, but not limited to, the requirements specified in Welfare and Institutions Code [s]ection 361.3. [¶] .211 Preferential consideration for placement of the child shall be given to a non-custodial parent, then an adult who is a grandparent, aunt, uncle or sibling of the child. [¶] ... [¶] .22 A licensed foster family home, licensed small family home, or a licensed foster family agency for placement in a family home which has been certified by the foster family agency."

Once again, this regulation establishes priorities for discretionary foster care placement. It creates no mandatory duties. Its purpose is not to prevent sexual abuse.

2. Appropriate placement and supervision.

(8) Terrell argues that DSS Manual regulations 31-405.1(j) and 31-420.1 require the County to place a foster child in an appropriate environment and monitor the child's condition. We address these two regulations.

A. DSS Manual regulation 31-405.1(j) provides: "When arranging for a child's placement the social worker shall: [¶] ... [¶] Monitor the child's *643 physical and emotional condition, and take necessary actions to safeguard the child's growth and development while in placement." This regulation sets forth general policy goals for the social worker, but does not specifically direct the manner in which the goals will be attained. It creates no mandatory duty. (Cf. *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 142[32 Cal.Rptr.2d 643] [DSS regulation requiring monthly visits creates a mandatory duty].) Placement and supervision are functions involving the exercise of discretion. A county is not the insurer of a child's physical and emotional condition, growth and development while in foster care placement. (*Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 741[14 Cal.Rptr.2d 553].)

B. DSS Manual regulation 31-420.1 provides in relevant part: "The foster care placement shall be based on the following needs of the child including, but not limited to: [¶] .11 The least restrictive, most family-like environment. [¶] ... [¶] .14 Capability of the foster parent(s) to meet specific needs of the child. [¶] ... [¶] .19 The most appropriate placement selection." This regulation is also a general policy statement and creates no mandatory duty. Its purpose is not to prevent sexual abuse.

3. Other enactments.

Terrell has also pointed to Welfare and Institutions Code section 16501, subdivision (c) ^{FN3} and DSS Manual regulation 31-3012.21 ^{FN4} as sources of mandatory duties. However, Terrell has failed to set forth the breach of any mandatory duty created by this statute or regulation, and we are unable to discern a mandatory duty.

FN3 Welfare and Institutions Code section 16501, subdivision (c) provides: "The county shall provide child welfare services as needed pursuant to an approved service plan and in accordance with regulations promulgated, in consultation with the counties, by the department. Counties may contract for service-funded activities as defined in paragraph (1) of subdivision (a). Each county shall use available private child welfare resources prior to developing new county-operated resources when the private child welfare resources are of at least equal quality and lesser or equal cost as compared with county-operated resources. Counties shall not contract for needs assessment, client eligibility determination, or any other activity as specified by regulations of the State Department of Social Services, except as specifically authorized in Section 16100."

FN4 DSS Manual regulation 31-3012.21 provides: "Counties shall not contract for case management services and any activities which are mandated by the Division 31 regulations to be performed by the social worker."

Derivative Liability

A public entity may be derivatively liable under certain circumstances for acts or omissions of

employees. (Gov. Code, § 815.2.) Government Code section 815.2 provides: "(a) A public entity is liable for injury proximately *644 caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. [¶] (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

(9) "[Government Code s]ection 815.2 thus imposes upon public entities vicarious liability for the tortious acts and omissions of their employees, and makes it clear that in the absence of statute a public entity cannot be held liable for an employee's act or omission where the employee himself or herself would be immune." (Becerra v. County of Santa Cruz, supra, 68 Cal.App.4th at p. 1461.) "Identification of a specific employee tortfeasor is not essential to County liability under [Government Code] section 815.2." (*Id.* at p. 1462, fn. 5.)

(10) Government Code section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." "[T]he determination to place a child in a particular foster [family] home is ... immune from liability pursuant to Government Code section 820.2." (Becerra v. County of Santa Cruz, supra, 68 Cal.App.4th at p. 1462.) "[T]he choice of a foster [family] home for a dependent child is a complex task requiring the consideration and balancing of many factors to achieve statutory objectives." (*Id.* at p. 1464.) "Selecting and certifying a foster [family] home for care of dependent children seems to us to be an activity loaded with subjective determinations and fraught with major possibilities of an erroneous decision. It appears to us that foster [family] home placement ... constitutes an activity of a co-equal branch of government, and that the discretionary decisions made in connection therewith should be deemed beyond the proper scope of court review." (*Ibid.*) A county social worker is immune from liability for negligent supervision of a foster child unless the social worker fails to provide specific services mandated by statute or regulation. (*Id.* at pp. 1465-1466; Scott v. County of Los Angeles, supra, 27 Cal.App.4th at p. 142.) ^{FN5}*645

FN5 Elton v. County of Orange (1970) 3 Cal.App.3d 1053[84 Cal.Rptr. 27], upon which Terrell relies, is not controlling authority in this case for three reasons. First, the appeal in *Elton* followed a demurrer, not a summary judgment. Second, *Elton* was decided prior to the adoption of statutes mandating the exercise of discretion by social workers. Third, the *Elton* court (Ronald S. v. County of San Diego (1993) 16 Cal.App.4th 887, 898[20 Cal.Rptr.2d 418]) later severely limited the holding of *Elton* and described the decision as "difficult." (Becerra v. County of Santa Cruz, supra, 68 Cal.App.4th at p. 1464.)

Supervision

(11) Terrell alleged the County social worker failed to adequately supervise him. He argues the County social worker saw him face-to-face only once per calendar month and never visited him in his foster family home. The evidence is undisputed that the County social worker complied with the visitation schedule mandated by the regulations. In addition, Terrell was placed with a licensed foster family agency; a social worker from that agency visited Terrell in his foster family home two or three times a month. The foster family agency social worker reported that Terrell had his own bedroom. Terrell never disclosed to either the County or the foster family agency social workers, during these visits, the improprieties or sexual abuse that took place commencing on April 1, 1999, the first day of his foster placement in the Poole residence. Terrell appeared to the social workers to be content in a stable placement. The appropriate degree of supervision of a foster parent, in excess of the visitation schedule mandated by statute or regulation, is a uniquely discretionary activity for which the County social worker and the County are immune.

Placement with Certified Foster Parent

(12) A certified foster parent is an individual certified by a state-licensed foster family agency. The social worker may place a child with a licensed foster family agency for placement in a foster family home that has been certified by the foster family agency as meeting its standards. (Welf. & Inst. Code, § 361.2, subd. (e)(6); DSS Manual reg. 31-420.22.) Wings of Refuge is licensed by the state as a foster family

agency. Prior to April 1, 1999, Wings of Refuge certified Robert Poole as a foster parent. The program statement of Wings of Refuge provides: "Wings of Refuge uses the M.A.P.P. (Model Approach for Partnership in Parenting) model for training, and require[s] potential Certified Parents to complete 30 hours of pre-certification training." The program statement is prepared by the foster family agency and submitted to the DSS, Community Care Licensing Division as part of its requisite plan of operation. (Cal. Code Regs., tit. 22, § 88022.) The program statement is required by DSS Manual regulations and is considered part of the license of the foster family agency. The foster family agency is required to operate within the terms specified in the plan of operation. (*Ibid.*) The program statement is also submitted to the County and becomes a contract between the County and the foster family agency. Robert Poole had completed only 15 hours of MAPP training prior to his certification. The County social worker was aware of this fact. *646

The County social worker had a ministerial duty to place Terrell with a licensed foster family agency for placement in a certified foster family home. Wings of Refuge is a licensed foster family agency, and Wings of Refuge certified the Poole residence as a foster family home. The County social worker placed Terrell with Wings of Refuge for placement in the Poole residence. Thus, the County social worker complied with her ministerial duty. It was the duty of Wings of Refuge to certify the Poole residence as a foster family home in compliance with its license with the state and its contract with the County. It is true that the state license and the County contract of Wings of Refuge required 30 hours of MAPP training prior to certification of a foster family home by Wings of Refuge. It is also true that in the case of Robert Poole, Wings of Refuge relaxed the requirement by permitting Robert Poole to complete 15 hours of MAPP training prior to certification and the remainder after certification. The evidence is undisputed that the reason for the relaxation was to expedite the certification of the Poole residence in order to facilitate the placement of Terrell with a family friend. There is no evidence of any improper purpose or motivation. The knowledge of the County social worker of the relaxation of the MAPP training requirements under these circumstances cannot reasonably be construed as knowledge that the certification was a "sham."

Disposition

(Cite as: 102 Cal.App.4th 627)

The petition for writ of mandate is granted. Respondent court is ordered to vacate its decision denying the motion of the County of Los Angeles for summary judgment; enter a new and different order granting the motion, and enter judgment in favor of the County of Los Angeles. The parties are to bear their own costs in these writ proceedings.

Turner, P. J., and Armstrong, J., concurred.

A petition for a rehearing was denied October 18, 2002, and the petition of real party in interest for review by the Supreme Court was denied December 18, 2002. Kennard, J., and Moreno, J., were of the opinion that the petition should be granted. *647

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County of Los Angeles v. Superior Court

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Jacqueline T. v. Alameda County Child Protective Services
Cal.App. 1 Dist., 2007.

Court of Appeal, First District, Division 3, California.
JACQUELINE T. et al., Plaintiffs and Appellants,
v.

ALAMEDA COUNTY CHILD PROTECTIVE SERVICES et al., Defendants and Respondents.
No. A116420.

Sept. 20, 2007.
As Modified Oct. 4, 2007.

Background: Mother, as guardian ad litem for her minor children, brought negligence action against county department of child services and two of its employees arising from the employees' investigation into possible sexual abuse of the children. The department and employees moved for summary judgment on the basis of immunity. After initially denying the motion, the Superior Court, Alameda County, No. RG04159625, Winifred Y. Smith, J., vacated its order in compliance with alternative writ of mandate from the Court of Appeal, and entered order granting summary judgment. Mother appealed.

Holdings: The Court of Appeal, Horner, J., sitting by assignment, held that:

(1) alleged acts or omissions by department employees were discretionary such that the employees were statutorily immune from liability and the department was immune from derivative liability, and

(2) the department did not fail to discharge a mandatory duty so as to be capable of being found directly liable.

Affirmed.

[1] Infants 211 17

211 Infants
211II Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

Alleged acts or omissions by county department of child services employees in investigating allegations that mother's children had been sexually abused were discretionary, rather than operational or ministerial, such that the employees were statutorily immune from liability and, consequently, county was immune from derivative liability, in mother's negligence action; alleged acts or omissions did not pertain to the actual delivery of public social services, but involved preliminary determinations regarding whether such services were necessary. West's Ann.Cal.Gov.Code § 815.2, 820.2, 821.6.

[2] Municipal Corporations 268 727

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k727 k. Duties Absolutely Imposed.

Most Cited Cases

An "enactment" imposed on a public entity for which the entity is under a mandatory duty to act, for purposes of waiver of liability under the California Tort Claims Act, may include both formal legislative measures, such as statutes, and quasi-legislative measures, such as regulations adopted by a state agency. West's Ann.Cal.Gov.Code § 815.6.

[3] Appeal and Error 30 170(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k170 Nature or Subject-Matter of Issues or Questions

30k170(1) k. In General. Most Cited Cases

Mother failed to preserve for appellate review claims relating to county's waiver of immunity that were based on mandatory duties allegedly imposed by certain penal code provisions that mother did not include in her arguments to trial court. West's Ann.Cal.Gov.Code § 815.6.

[4] Infants 211 17

211 Infants

211III Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

County department of child services did not fail to discharge a mandatory duty imposed by the Child Abuse Neglect and Reporting Act (CANRA) so as to be liable under the California Tort Claims Act for alleged acts or omissions in relation to the investigation of mother's and others' reports that children were being sexually abused, even though the CANRA indicated legislature's intent that all persons participating in the investigation of child sexual abuse "shall do whatever is necessary to prevent psychological harm to the child victim;" the expression of legislative intent did not set forth a specific statutory duty. West's Ann.Cal.Gov.Code § § 815.2, 815.6; West's Ann.Cal.Penal Code § 11164 et seq.

[5] Municipal Corporations 268 ↪727

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k727 k. Duties Absolutely Imposed. Most Cited Cases

An enactment does not create a mandatory duty so as to hold governmental entity liable under the California Tort Claims Act for failing to discharge such duty if the enactment merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion. West's Ann.Cal.Gov.Code § 815.6.

[6] Infants 211 ↪13.5(2)

211 Infants

211III Protection

211k13.5 Duty to Report Child Abuse

211k13.5(2) k. Liabilities; Immunity. Most Cited Cases

Infants 211 ↪17

211 Infants

211III Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

County department of child services did not fail to discharge mandatory duties imposed by Child Abuse Neglect and Reporting Act (CANRA) reporting

requirements so as to be liable under the California Tort Claims Act for alleged acts or omissions in relation to the investigation of reports that mother's children were being sexually abused; certain CANRA provisions pertained only to "reporters," whereas the department was a receiver of reports, and agency cross-reporting duties either did not pertain, were fully discharged by the department or, if not timely discharged, could not have caused the injuries suffered. West's Ann.Cal.Gov.Code § 815.6; West's Ann.Cal.Penal Code § § 11166(a, f, i), 11166.3.

[7] Infants 211 ↪13.5(2)

211 Infants

211III Protection

211k13.5 Duty to Report Child Abuse

211k13.5(2) k. Liabilities; Immunity. Most Cited Cases

Infants 211 ↪17

211 Infants

211III Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

Penal code definition of "mandatory reporters" as to those required to report suspicions of sexual abuse of a child, which definition included county employees, did not impose a mandatory duty on county department of child services as would permit a finding that county was liable for failing to discharge such duty, in action brought by mother of children arising from the county's investigation of reports that mother's children were being sexually abused. West's Ann.Cal.Gov.Code § 815.6; West's Ann.Cal.Penal Code § 11165.7.

[8] Infants 211 ↪17

211 Infants

211III Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

County department of child services did not fail to discharge a mandatory duty to accept reports of child sexual abuse so as to permit its liability under the California Tort Claims Act in mother's negligence action, absent evidence that county employees refused to accept reports of abuse regarding mother's children. West's Ann.Cal.Gov.Code § 815.6; West's Ann.Cal.Penal Code § 11165.9.

[9] Infants 211 ↪17

211 Infants

211III Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

County department of child services did not fail to discharge a mandatory duty imposed by the Welfare and Institutions Code to "respond to any report of imminent danger to a child immediately and all other reports within 10 calendar days," so as to be liable under the California Tort Claims Act for alleged acts or omissions in relation to the investigation of reports that mother's children were being sexually abused; after receiving the reports of suspected sexual abuse, the department determined that the children were not in imminent danger, and the department responded to the reports within 10 days. West's Ann.Cal.Gov.Code § 815.6; West's Ann.Cal.Welf. & Inst.Code § 16501(f).

[10] Infants 211 ↪17

211 Infants

211III Protection

211k17 k. Societies, Agencies, and Officers in General. Most Cited Cases

There was no evidence that county department of child services failed to discharge a mandatory duty to utilize social workers "skilled in emergency response" when responding to referrals of reports of alleged child abuse, as required by the department's regulations manual, and thus, the department could not be liable under the California Tort Claims Act in mother's action alleging negligence in connection with the department's investigation into reports that mother's children were sexually abused. West's Ann.Cal.Gov.Code § 815.6.

Stephen P. Ajalat, Ajalat & Ajalat, North Hollywood, for Appellant.

Rebecca S. Widen, Haapala, Altura, Thompson & Abern, Oakland, for Respondents, County of Alameda, Michael Yee and Paula Richards.

HORNER, J. ^{FN*}

*1 This is an appeal from a judgment entered in favor of respondents Alameda County Child Protective Services (County) and two of its employees, Michael Yee and Paula Richards (collectively, Employees). Appellant Jacqueline T., individually and as Guardian Ad Litem for minors Roes 1 through 3 (collectively, Minors), filed a complaint alleging

several causes of action sounding in negligence and negligence per se based on Employees' conduct in investigating reports of possible sexual abuse to Minors.

Respondents moved for summary judgment, which the trial court denied. Respondents then filed a petition for a writ of mandate or prohibition in this court, which we granted after concluding respondents were immune from liability under Government Code section 820.2 and/or section 821.6. Complying with the alternative writ, the trial court vacated its order denying respondents' summary judgment motion and entered a new order granting the motion.

On appeal, Jacqueline T. raises essentially the same arguments she relied upon in opposing summary judgment and the petition for a writ of mandate or prohibition. And for the same reasons we rejected her arguments previously, we reject them here. The judgment will thus be affirmed.

Jacqueline T. is mother to Minors with her former husband, Albert G. (collectively, parents). After they divorced, parents shared joint custody of Minors, while primary physical custody remained with Jacqueline T. Minors routinely had weekend visits with Albert G. at the house he shared with his girlfriend, Kelly D., and her 11-year-old son, N. On three occasions-in 1998, 1999, and 2000-County received reports alleging that N. was sexually abusing Roes 1 and 2 during their weekend visits with Albert G.

The first report was submitted on August 27, 1998 by Minors' therapist, Dr. Clark Conant. According to the report, Dr. Conant informed County that, during a visit to his office, Roe 2 screamed when using the toilet. Jacqueline T. then examined Roe 2 and found redness in her vaginal area. When asked about the redness, Roe 2 explained she "hate[s] N." because "he sits on me and kisses me." Roe 1 then said that N. asked Roe 2 to kiss Roe 1 and to suck his penis.

After receiving the report, County immediately completed an Emergency Response Unit Child Protective Services (CPS) intake form and screener narrative, and the matter was referred to respondent Michael Yee, a County social worker, for investigation. During his subsequent investigation, Yee, among other things, contacted Jacqueline T.;

prepared a history; visited the homes of both Jacqueline T. and Albert G.; conducted interviews of N., N.'s mother and siblings, and Minors; and spoke by telephone with Albert G.^{FN1} In addition, on September 26, 1998, Yee cross-reported the alleged abuse to the Newark [City] Police Department, which decided not to pursue any action at that time. Ultimately, Yee concluded in a written investigative narrative that the child abuse allegations were unsubstantiated, noting in doing so that parents were engaged in a "messy child custody fight."

*2 The second report was submitted on October 29, 1999 by Minors' maternal great-grandmother. According to this report, Roe 2 told her great-grandmother during a bath to "lick her bootie." When the great-grandmother asked Roe 2 where she learned to say that, Roe 2 said from N.

Again, after receiving the report, County immediately conducted an Emergency Response Unit CPS intake form and screener narrative, and the matter was referred to respondent Paula Richards, another County social worker, for investigation. During Richards' subsequent investigation, she reviewed the file from Yee's investigation the prior year, and noted that the screener narrative identified the new allegations as substantially similar to the earlier ones that Yee had found unsubstantiated. Richards spoke several times by telephone with Jacqueline T. and attempted a home visit, but no one answered the door. She also obtained authorization from Jacqueline T. to speak to Minors' family court therapist, and thereafter spoke to the therapist several times.

Like Yee, Richards also cross-reported the alleged abuse to the Newark [City] Police Department. In doing so, Richards spoke to the officer assigned to the case, Detective Ramirez, who informed her that she was familiar with the family and had decided against pursuing a criminal investigation at that time, noting the family was dealing with several custody issues.

Ultimately, Richards deferred further investigation due in part to the ongoing and contentious family court proceedings and mediation. But Richards kept the matter open until 2000, when the third report of suspected abuse was received.

The third report on June 29, 2000 was again submitted by Minors' maternal great-grandmother, and then referred to Richards upon the immediate completion of an Emergency Response Unit CPS

intake form and screener narrative. In the third report, the great-grandmother stated, among other things, that Roe 1 had told her N. was "gay," and when she asked him to explain why he believed this, Roe 1 had explained N. pulls his own and Roe 1's pants down and puts his private part on Roe 1 and in his face. The great-grandmother also reported that, when Jacqueline T. asked Roe 2 whether anyone had touched her private parts, she replied: "N. sometimes touches me with my pants off and my pants on." Roe 2 further told her: "I hate going there [to N.'s house] every time he does it, and I don't like it." Jacqueline T. then asked Roe 1 whether N. touched his private parts, and he responded, "not me, just [Roe 2]."

In response to the third report, Richards again cross-reported to Newark [City] Police Department, speaking to Detective Ramirez on July 7, 2000. County, in conjunction with the Newark [City] Police Department and the Alameda County District Attorney's office, then arranged for Child Abuse Listening Interview Coordination Center (CALICO) interviews of Roes 1 and 2, which were conducted one-on-one by a forensic child interviewer on July 13, 2000.

*3 Ultimately, all three agencies-County, the Newark [City] Police Department and the Alameda County District Attorney's office-concluded based on the evidence that the sexual abuse allegations were unsubstantiated. Thereafter, Richards concluded in a written investigative narrative that nothing the children said during the CALICO interviews indicated they had been sexually abused, and that their encounters with N., including one in which, according to Roe 1, N. "put his dick-his private part on my face," were best described as "horseplay."^{FN2} Richards thus closed the case file.

Sometime after the case was closed, N. admitted sexually molesting Roes 1 and 2. And during subsequent CALICO interviews, the children revealed much more specific evidence of N.'s abuse. N. was thus criminally charged for the abuse and detained in a juvenile detention facility.

On June 8, 2004, Jacqueline T. filed this lawsuit, asserting causes of action for: (1) child endangerment/negligence per se, (2) statutory violations/negligence per se, (3) negligence, and (4) negligent hiring, supervision and retention. After two rounds of amendments, respondents demurred to the second amended complaint on the ground that they were immune from liability under Government Code

sections 821.6 and 820.2. The trial court overruled the demurrer. Respondents then moved for summary judgment on the same ground, which the trial court also denied.

On June 26, 2006, respondents filed a petition for writ of mandate or prohibition in this court, challenging the trial court's denial of its motion for summary judgment. After permitting informal briefing, this court issued an alternative writ of mandate directing the trial court to set aside and vacate its order denying summary judgment and to enter an order granting the motion. Alternatively, this court ordered the trial court to show cause why it should not be compelled to comply with the alternative writ.

On August 11, 2006, the trial court complied with the alternative writ, issuing an order granting summary judgment to respondents. This court thus discharged the alternative writ and summarily denied the petition as moot. As such, no formal briefing was ordered, and the matter never came on calendar for hearing. Respondents have included the alternative writ as Exhibit B to Respondents' Brief. (*Alameda County Child Protective Services et al. v. Superior Court of Alameda County*, (Aug. 3, 2006, A114230) [Order issuing alternative writ].)

On September 12, 2006, Jacqueline T. filed a petition for review in the California Supreme Court, which was denied. On October 18, 2006, judgment was entered in favor of respondents, leading to this appeal.

Summary judgment shall be granted if all the papers submitted show there is no triable issue of material fact and that the moving party is entitled to judgment as a matter of law. We review this question of law independently. (Code Civ. Proc., § 437c, subd. (c); *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1449-1450, 16 Cal.Rptr.2d 320.) In doing so, however, "we must view the evidence in a light favorable to ... the losing party [citation], liberally construing [his] evidentiary submissions while strictly scrutinizing [the prevailing party's] own showing, and resolving any evidentiary doubts or ambiguities in [the losing party's] favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769, 107 Cal.Rptr.2d 617, 23 P.3d 1143; *Barton v. Elexsys International, Inc.* (1998) 62 Cal.App.4th

1182, 1187-1188, 73 Cal.Rptr.2d 212.)

*4 Here, summary judgment was granted on the ground that, as a matter of law, respondents are immune from liability for alleged negligence and negligence per se in connection with reporting, investigating and cross-reporting allegations that Roes 1 and 2 had been sexually abused. Jacqueline T. contends this grant of summary judgment on immunity grounds was erroneous because respondents' alleged investigatory failures amounted to breaches of "mandatory and ministerial" duties.

This court has once before addressed the issue of respondents' immunity under California law. As set forth above, in issuing an alternative writ of mandate ordering the trial court to grant summary judgment in favor of respondents, we concluded both County and Employees were immune from liability under two statutes—Government Code sections 821.6 and/or 820.2. In so concluding, we reasoned that "the investigation of allegations of child abuse and the decision of what action, if any, should be taken are uniquely governmental functions. [fn.] A decision to remove a child from his/her home or not to do so and the investigation that informs that decision involve precisely the kinds of 'sensitive policy decision[s]' that require[] judicial abstention to avoid affecting a coordinate governmental entity's decisionmaking or planning process." (*Barner v. Leeds* (2000) 24 Cal.4th 676,] 688[, 102 Cal.Rptr.2d 97, 13 P.3d 704].)"

Despite having previously explained via the alternative writ our conclusion that respondents are entitled to immunity, we consider the issue anew on appeal, given that we summarily denied respondents' writ petition as moot, without ordering formal briefing or giving the parties the opportunity for oral argument, when the trial court complied with the writ. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894, 899, 12 Cal.Rptr.2d 728, 838 P.2d 250 [where a respondent to a petition for writ of mandate chooses to act in conformity with the alternative writ, the petition becomes moot and there is no cause to be decided by the court of appeal in a written opinion].) We therefore turn again to the relevant law.

Under the California Tort Claims Act, Government Code section 810 et seq., ^{FN3}[e]xcept as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." ^{FN4}(§ 815, subd. (a))

(Cite as: --- Cal.Rptr.3d ---)

[emphasis added] [Stats.1963, ch. 1681, § 1, p. 3268].) "The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person." (*id.* at subd. (b).)

Here, Jacqueline T. sets forth two statutory bases for holding respondents liable under the California Tort Claims Act. First, Jacqueline T. seeks to hold County derivatively liable for the alleged acts or omissions of Employees under section 815.2. Second, she seeks to hold County directly liable for alleged acts or omissions under section 815.6. We address each claim in turn.

A. Liability Under Section 815.2.

*5 "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (§ 815.2, subd. (a); Stats.1963, ch. 1681, § 1, p. 3268.) "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (§ 815.2, subd. (b).) (Stats 1963, ch. 1681, § 1, p. 3268.)

Here, Jacqueline T. seeks to hold County derivatively liable for Employees' alleged acts or omissions in investigating allegations that Roes 1 and 2 had been sexually abused. Respondents, in turn, argue Employees, and thus County, are immune from such liability under section 820.2 and section 821.6. Section 820.2 provides: "... a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Section 821.6, in turn, provides: "... a public employee is not liable for injury caused by his [or her] instituting or prosecuting any judicial or administrative proceeding within the scope of his [or her] employment, even if he [or she] acts maliciously and without probable cause." (Stats 1963, ch. 1681, § 1, p. 3269; Stats 1963, ch. 1681, § 1, p. 3270.)

Our California Supreme Court has recently

considered a claim of a public employee's so-called discretionary act immunity under section 820.2. In Barner v. Leeds, supra, 24 Cal.4th 676, 102 Cal.Rptr.2d 97, 13 P.3d 704, the court concluded "not all acts requiring a public employee to choose among alternatives entail the use of 'discretion' within the meaning of section 820.2." (Barner, supra, 24 Cal.4th at pp. 684-685, 102 Cal.Rptr.2d 97, 13 P.3d 704 [Barner].) Rather, immunity is limited to policy and planning decisions, and does not reach "lower level decisions that merely implement a basic policy already formulated." (*Id.* at p. 685, 102 Cal.Rptr.2d 97, 13 P.3d 704.) "The scope of the discretionary act immunity 'should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.'" (*Ibid.*)

Applying this rule to the facts before it, the Barner court concluded a public defender's initial decision to provide representation to a criminal defendant was a "sensitive policy decision" subject to discretionary act immunity under section 820.2. (Barner, supra, 24 Cal.4th at p. 688, 102 Cal.Rptr.2d 97, 13 P.3d 704.) A public defender's subsequent decisions in implementing that initial decision, such as decisions regarding the type and extent of legal services to provide the defendant, however, were "operational," i.e. related to policy implementation, and thus not subject to immunity under section 820.2. (*Ibid.*)

*6 Here, not surprisingly, Jacqueline T. argues Employees' alleged tortious acts were "operational decisions," and thus not immunized by § 820.2. She reasons that "[m]any of the decisions inherent to th[e] [investigatory] process"-including whether to accept a report of child abuse from a reporter, whether to prepare an internal report and to timely cross-report to other agencies, whether to respond immediately, whether to utilize social workers skilled in emergency response, whether to interview certain individuals regarding the allegations or to have in-person contact with the alleged victim, and whether to take further actions to protect the victim-are "largely operational or ministerial decisions pertinent to the 'implementation' of those and other prescribed duties, as well as to the overall investigative function."

Several appellate courts, however, have rejected such reasoning. Those courts have held that a social worker's decisions relating to, as here, the investigation of child abuse, removal of a minor, and instigation of dependency proceedings, are

discretionary decisions subject to immunity under section 820.2, and/or prosecutorial or quasi-prosecutorial decisions subject to immunity under section 821.6. (E.g., Alicia T. v. County of Los Angeles (1990) 222 Cal.App.3d 869, 882-883, 271 Cal.Rptr. 513 [county and its social workers held immune from liability under “either or both of [sections 820.2 and 821.6]” for alleged negligence in investigating report of child molestation] [Alicia T.]; Jenkins v. County of Orange (1989) 212 Cal.App.3d 278, 282-283, 260 Cal.Rptr. 645 [county and its social workers held immune from liability under section 821.6 for “fail[ing] to use due care by not thoroughly investigating the child abuse report and fail[ing] to weigh and present all the evidence”] [Jenkins]; Newton v. County of Napa (1990) 217 Cal.App.3d 1551, 1559-1561, 266 Cal.Rptr. 682 [citing section 820.2 in holding county immune from liability for actions “necessary to make a meaningful investigation” of child abuse] [Newton]; County of Los Angeles v. Superior Court (2002) 102 Cal.App.4th 627, 633, 644-645, 125 Cal.Rptr.2d 637 [county held immune from liability under section 820.2 for alleged negligent placement and supervision of child in foster home where child was sexually molested] [Terrell R.]; see also Ronald S. v. County of San Diego (1993) 16 Cal.App.4th 887, 899, 20 Cal.Rptr.2d 418 [county held immune from liability under section 821.6 for negligent selection of an adoptive home for a dependent child] [Ronald S.]). Such courts have reasoned that “[c]ivil liability for a mistaken decision would place the courts in the ‘unseemly position’ of making the county accountable in damages for a ‘decisionmaking process’ delegated to it by statute.” (E.g., Newton, supra, 217 Cal.App.3d at p. 1560, 266 Cal.Rptr. 682. See also Ronald S., supra, 16 Cal.App.4th at p. 897, 20 Cal.Rptr.2d 418 “[t]he nature of the investigation to be conducted and the ultimate determination of suitability of adoptive parents [by social workers] bear the hallmarks of uniquely discretionary activity”).)

*7 Alicia T. is illustrative. There, the plaintiff argued, as Jacqueline T. does here, that a social worker's investigative decision-making is ministerial and not discretionary. Rejecting this argument, the court explained: “It is necessary to protect social workers in their vital work from the harassment of civil suits and to prevent any dilution of the protection afforded minors by the dependency provisions of the Welfare and Institutions Code. Therefore, social workers must be absolutely immune from suits alleging the improper investigation of child abuse, removal of a

minor from the parental home based upon suspicion of abuse and the instigation of dependency proceedings.” (Alicia T., supra, 222 Cal.App.3d at p. 881, 271 Cal.Rptr. 513.)

Similarly, relying on section 821.6, the court in Jenkins concluded a social worker was entitled to absolute immunity from liability arising out of her actions in investigating child abuse allegations, initiating dependency proceedings and removing a child from his custodial parent. (212 Cal.App.3d at p. 283-284, 287, 260 Cal.Rptr. 645.) In doing so, the court explained immunity under section 821.6 covers not just the act of filing a criminal complaint, but also other prosecutorial or quasi-prosecutorial functions such as weighing and presenting evidence when rendering a decision on whether to proceed with litigation. (Id. at p. 284, 260 Cal.Rptr. 645; see also Kemmerer v. County of Fresno (1988) 200 Cal.App.3d 1426, 1436-1437, 246 Cal.Rptr. 609; Amylou R. v. County of Riverside (1994) 28 Cal.App.4th 1205, 1209-1210, 34 Cal.Rptr.2d 319 [concluding that “since investigation is part of the prosecution of a judicial proceeding,” (id. at p. 1211, 34 Cal.Rptr.2d 319) acts committed in the course of the investigation are covered by section 821.6].)

Of course, particularly in light of our Supreme Court's decision in Barner, we would be remiss to interpret the case law as supporting the proposition that all actions by social workers involve policy or prosecutorial decisions falling within the scope of statutory-immunity. On this point, Scott v. County of Los Angeles (1994) 27 Cal.App.4th 125, 141, 32 Cal.Rptr.2d 643 (Scott), is illustrative. There, the court held a social worker could be held liable for negligent supervision of a foster child where she failed to comply with regulations requiring her to make monthly home visits to the child. (Id. at p. 142, 32 Cal.Rptr.2d 643.) In doing so, the court reaffirmed Alicia T.'s holding that a social worker's decision to initiate dependency proceedings is a quasi-prosecutorial decision immunized by section 821.6. The court clarified, however, that the “actual delivery of public social services, such as foster care, to abused, neglected or exploited children,” are actions governed by specific statutory or regulatory directives “which leave the officer no choice.” (Id. at pp. 141, 143, 32 Cal.Rptr.2d 643.) As such, they would not be subject to immunity. (Ibid.)

Newton is also helpful. There, the court held a county was immune from liability for conduct relating to its investigation of reported child abuse, including

“failing to properly, thoroughly and completely investigate the source and basis for the underlying [child abuse] complaint.” (*Newton*, 217 Cal.App.3d at p. 1561-1562 and fn. 5, 266 Cal.Rptr. 682.) Immunity did not extend, however, “beyond actions implied in the decision to investigate” to “gratuitous actions, unnecessary for a proper investigation.” (*Id.* at pp. 1560-1561, 266 Cal.Rptr. 682.) The county was thus not immune for such gratuitous actions as causing the minors to disrobe and stand naked in the presence of strangers and failing to seek or receive voluntary consent to disrobe them. (*Id.* at p. 1562 and fn. 5, 266 Cal.Rptr. 682.)

*8 [1] With this case law in mind, we turn to the facts before us. Unlike in *Scott*, we are not concerned with the actual delivery of public social services to abused, neglected or exploited children. Rather, we are concerned with social workers' preliminary determinations regarding whether such services, including removal, were in fact necessary. Moreover, unlike in *Newton*, Jacqueline T. makes no claim that Employees engaged in “gratuitous actions” unnecessary for a proper investigation. Rather, the alleged acts and omissions of which Jacqueline T. complains—including the failure to conduct a reasonable and diligent investigation and to timely cross-report to other agencies—were incidental to Employees' investigation, within the scope of their employment, of reports of possible abuse to Roes 1 and 2, and Employees' subsequent conclusion that such reports did not warrant initiation of dependency proceedings. (*Newton*, 217 Cal.App.3d at pp. 1561-1562 and fn. 5, 266 Cal.Rptr. 682) [“failing to properly, thoroughly and completely investigate the source and basis for the underlying [child abuse] complaint” were not gratuitous actions unnecessary for a proper investigation.] As such, we conclude as a matter of law that Employees' alleged acts and omissions are covered by the broad grant of immunity section 821.6 affords to “[a public employee's] instituting or prosecuting any judicial or administrative proceeding within the scope of his [or her] employment” (§ 821.6), as well as the grant of immunity section 820.2 affords to sensitive policy decisions that result from a governmental entity's unique decisionmaking or planning process (§ 820.2; *Barner, supra*, 24 Cal.4th at p. 688, 102 Cal.Rptr.2d 97, 13 P.3d 704).^{FNS}

Further, because we conclude Employees are immune from liability for their alleged acts and omissions under sections 820.2 and 821.6, we conclude County is likewise immune. “Though sections 821.6 and

820.2 expressly immunize only the employee, if the employee is immune, so too is the County. (Gov.Code, § 815.2, subd. (b); *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491, 496 [203 Cal.Rptr. 33].) (*Kemmerer v. County of Fresno, supra*, 200 Cal.App.3d at p. 1435, 246 Cal.Rptr. 609.)

We thus turn to the issue of County's direct liability under section 815.6.

B. Liability under Section 815.6.

[2] A public entity may be directly liable for failure to discharge a mandatory duty. Section 815.6 provides: “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” (Stats.1963, ch. 1681, § 1, p. 3268.) An enactment for purposes of section 815.6 may include both formal legislative measures, such as statutes, and quasi-legislative measures, such as regulations adopted by a state agency. (*Scott, supra*, 27 Cal.App.4th at pp. 134, 142, 32 Cal.Rptr.2d 643.)

*9 A public entity may avoid direct liability under section 815.6, as it may avoid derivative liability under section 815.2, by establishing that it has statutory immunity. Section 815, subdivision (b) provides: “[t]he liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.” Further, as set forth above, section 815.2, subdivision (b) provides: “Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.” (Stats 1963, ch. 1681, § 1, p. 3268; see also *Kemmerer, supra*, 200 Cal.App.3d at p. 1435, 246 Cal.Rptr. 609 [“[t]hrough sections 821.6 and 820.2 expressly immunize only the employee, if the employee is immune, so too is the County”].)

[3] Here, Jacqueline T. claims County may be held directly liable under section 815.6 for breach of mandatory duties imposed by the following

enactments: (1) Penal Code section 11164 et seq.; (2) Penal Code section 11166, subdivision (a), (f), and (i); (3) Penal Code section 11166.3; (4) Penal Code section 11165.7; (5) Penal Code section 11165.9; (6) Welfare and Institutions Code section 16501, subdivision (f); and (7) Department of Social Services Manual of Policies and Procedures (DSS Manual) regulation 31-101.2.^{FN6}We consider each claim below.

(1) Penal Code section 11164 et seq. (Stats.1987, ch. 1444, § 1.5, p. 5369.)

[4] Jacqueline T. contends Penal Code section 11164 et seq., also known as the Child Abuse and Neglect Reporting Act (CANRA), imposed a mandatory duty on County and Employees to investigate suspected child abuse. Moreover, Jacqueline T. contends County and Employees breached this mandatory duty, not by failing to investigate the alleged abuse, but rather by failing to “reasonably and diligently” investigate it.

Section 11164 provided:

“(a) This article shall be known and may be cited as the Child Abuse and Neglect Reporting Act.

“(b) The intent and purpose of this article is to protect children from abuse. In any investigation of suspected child abuse, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim.”^{FN7}

[5] As clear from this language, the statute imposed no mandatory duty on County or Employees. Rather, the statute merely stated the Legislature’s “intent and purpose” in enacting CANRA, an article composed of over 30 separate statutes. As such, section 11164 provided no statutory basis for liability under section 815.6. (*Terrell R., supra*, 102 Cal.App.4th at p. 639, 125 Cal.Rptr.2d 637 [an enactment creates a mandatory duty for purposes of section 815.6 only if “it requires a public agency to take a particular action. [Citation.] An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency’s exercise of discretion. [Citation.]”].)

*10 Moreover, to the extent Jacqueline T., in citing Penal Code section 11164 generally, actually seeks to rely on unspecified sections of CANRA to establish liability, such attempt would likewise fail. The law is

clear that, to prove a violation under section 815.6, a plaintiff must plead the existence of a specific statutory duty. “ ‘Unless the applicable enactment is alleged in specific terms, a court cannot determine whether the enactment relied upon was intended to impose an obligatory duty to take official action to prevent foreseeable injuries or whether it was merely advisory in character.’ [Citation.]” (*Terrell R., supra*, 102 Cal.App.4th at p. 638, 125 Cal.Rptr.2d 637.)

(2) Penal Code section 11166, subdivisions (a), (f), and (i). (Stats.1996, ch. 1081 § 3.5, pp. 7410-7412.)

[6] Jacqueline T. contends Penal Code section 11166, subdivisions (a), (f) and (i) imposed mandatory duties on County and Employees to accept reports of abuse from mandated, voluntary and anonymous reporters; to make internal reports; and to timely cross-report to other agencies regarding suspected child abuse.^{FN8}She further contends County and Employees breached these mandatory duties when Yee allegedly failed to timely cross-report to law enforcement after receiving a report of suspected abuse from Minors’ therapist, and when Richards allegedly failed to timely prepare an internal report or to timely cross-report to law enforcement after receiving reports of suspected abuse from Minors’ great-grandmother.

The relevant version of Penal Code section 11166, subdivision (a) required, with some exceptions, a child care custodian who “has knowledge of or observes a child, ... whom he or she knows or reasonably suspects has been the victim of child abuse” to report such abuse to a child protective agency immediately or as soon as practically possible. The relevant version of subdivision (f) permitted, but did not require, “[a]ny other person who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse may report the known or suspected instance of child abuse to a child protective agency.” And the relevant version of subdivision (i) required, with some exceptions, a county welfare department to “immediately, or as soon as practically possible” cross-report to law enforcement and certain other agencies by telephone “every known or suspected instance of child abuse,” and to submit a written report of the known or suspected abuse to such agencies “within 36 hours” of receiving the relevant information.

We conclude Jacqueline T.’s reliance on these three provisions to prove violations of section 815.6 is

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misplaced. With respect to Penal Code section 11166, subdivision (a), a mandatory duty was imposed on certain mandated reporters, including child care custodians, of child abuse. Here, County and Employees were the alleged *receivers* of three reports of alleged child abuse from third parties rather than the reporters themselves. As such, they could not, as a matter of law, have breached a mandatory duty to report pursuant to this provision.

*11 With respect to Penal Code section 11166, subdivision (g), it simply imposed no mandatory duty. Rather, it permitted, but did not require, certain voluntary reporters to submit reports of child abuse. As such, neither County nor Employees could, as a matter of law, have violated a mandatory duty pursuant to this provision. (*Terrell R., supra*, 102 Cal.App.4th at p. 639, 125 Cal.Rptr.2d 637 [“application of [Government Code] section 815.6 requires that the enactment at issue be *obligatory*”].)

Finally, as set forth above, the relevant version of Penal Code 11166 subdivision (i) required a county welfare department to “immediately, or as soon as practically possible” cross-report by telephone to certain public agencies “every known or suspected instance of child abuse,” and to then submit certain written reports within 36 hours. Here, it is undisputed that Employees cross-reported to the Newark [City] Police Department each of the three reports of alleged abuse it received. It is further undisputed that, following receipt of each of those cross-reports, the Newark [City] Police Department determined based on the evidence that the abuse allegations were unsubstantiated. As such, even assuming County or Employees breached a mandatory duty to *timely* cross-report under subdivision (i), Jacqueline T. could not, as a matter of law, establish that such breach was a proximate cause of Minors' alleged injuries, which section 815.6 requires.^{FN9} (*Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 980, 111 Cal.Rptr.2d 173 [to establish liability under section 815.6, a plaintiff “must demonstrate ... breach of the statute's mandatory duty was a proximate cause of the injury suffered”]; see also *Thai v. Stang* (1989) 214 Cal.App.3d 1264, 1274, 263 Cal.Rptr. 202 [“[i]f the same harm, both in character and extent, would have been sustained even had the actor taken the required precautions, his failure to do so is not even a perceptible factor in bringing it about and cannot [as a matter of law] be a substantial factor in producing it”].)

(3) Penal Code section 11166.3. (Stats.1988, ch. 898, § 1, pp. 2862-2863.)

Jacqueline T. also claims breach of a mandatory duty to cross-report instances of known or suspected child abuse pursuant to Penal Code section 11166.3.^{FN10}

The only language in the relevant version of this statute that purported to govern County's conduct provided: “The county welfare department or probation department shall, *in cases where a minor is a victim of actions specified in Section 288 of this code and a petition has been filed pursuant to Section 300 of the Welfare and Institutions Code with regard to the minor*, evaluate what action or actions would be in the best interest of the child victim”... and then “submit in writing its findings and the reasons therefor to the district attorney on or before the completion of the investigation.” (Emphasis added.) Here, undisputedly, no petition to initiate dependency proceedings had been filed pursuant to Welfare and Institutions Code section 300 when County's alleged breach of this duty occurred. As such, Penal Code section 11166.3 provided no basis for liability under section 815.6.

(4) Penal Code section 11165.7. (Stats.1992, ch. 459, § 1, pp. 1824-1825.)

*12 [7] Jacqueline T. contends Penal Code section 11165.7, like section 11166, subdivision (a), imposes a mandatory duty on County and Employees to report suspected child abuse, which they also breached in this case.^{FN11}

This provision sets forth the statutory definition of the term “mandated reporter”; it does not purport to impose any duty. As such, Jacqueline T.'s reliance on section 11165.7 to establish liability under section 815.6 fails.

(5) Penal Code section 11165.9. (Stats.1987, ch. 1459, § 16, p. 5521.)

[8] Jacqueline T. contends County and Employees breached a mandatory duty under Penal Code section 11165.9 to accept reports of suspected child abuse from mandated, voluntary and anonymous reporters. As Jacqueline T. concedes, however, a different version of this statute—one that merely set forth the statutory definition of “child protective agency” and

did not purport to impose any duty-was in effect when the alleged child abuse was occurring between 1998 and 2000.^{FNI2} Moreover, even assuming County or Employees were subject at the relevant time to a mandatory statutory duty to accept reports of abuse, Jacqueline T. neglects to inform us how or when they breached such duty. The undisputed evidence proved County received three reports of possible child abuse of Roes 1 and 2-Yee received one report from Minors' therapist, and Richards received two reports from Minors' great-grandmother. While Jacqueline T. complains County and Employees failed to adequately respond to these reports, she does not contend County or Employees refused to accept them. Given this, we conclude Jacqueline T. cannot as a matter of law prove any breach of a mandatory duty to accept reports of abuse.

(6) Welfare and Institutions Code section 16501, subdivision (f). (Stats.1996, ch. 1083, § 9, pp. 7593-7595.)

[9] Jacqueline T. contends County and Employees breached a mandatory duty under Welfare and Institutions Code section 16501, subdivision (f) to “respond to any report of imminent danger to a child immediately and all other reports within 10 calendar days.”^{FNI3}

With respect to the duty under this section to respond immediately to reports of imminent danger to a child, it is clear such duty arises only if a prior determination has been made that imminent danger exists-a discretionary determination expressly entrusted to County and Employees. (Newton, supra, 217 Cal.App.3d at p. 1560, 266 Cal.Rptr. 682.) As such, County's or Employees' determination that no imminent danger existed is protected by the broad grant of immunity sections 820.2 and 821.6 afford county welfare departments and their officials in investigating alleged acts of child abuse and thereafter deciding whether to instigate dependency proceedings. (Newton, supra, at p. 1560, 266 Cal.Rptr. 682 [concluding that county welfare department officials were immune from liability for their determination regarding whether an “emergency situation[]” existed that would trigger a mandatory duty to conduct an immediate in-person response pursuant to Welfare and Institutions Code section 16504]; see also Haggis v. City of Los Angeles (2000) 22 Cal.4th 490, 498, 507, 93 Cal.Rptr.2d 327, 993 P.2d 983 [where a statute calls for the exercise of judgment, expertise, and discretion, it does not create

a mandatory duty within the meaning of section 815.6].)

*13 With respect to the duty under Welfare and Institutions Code section 16501, subdivision (f) to “respond” within 10 days to “all other reports” of abuse, we conclude the undisputed evidence reveals no breach. Nowhere does the statute define “respond” or mandate a particular response. And here, County officials undisputedly responded to each report of alleged abuse of Roes 1 and 2 by promptly generating screener narratives and then referring the matters to social workers for investigation, well within 10 days of receiving the reports. To the extent Jacqueline T. contends these responses were inadequate, County's and Employees' decisions in this regard were again discretionary, and thus immunized under sections 820.2 and 821.6 for the reasons discussed. (Haggis, supra, 22 Cal.4th at p. 507, 93 Cal.Rptr.2d 327, 993 P.2d 983.)

(7) DSS Manual regulation 31-101.2.

[10] Finally, Jacqueline T. contends County breached a mandatory duty under DSS Manual regulation 31-101.2 to utilize social workers “skilled in emergency response” when responding to referrals of reports of alleged child abuse.^{FNI4}

We agree this regulatory language amounts to an order leaving County no choice but to utilize social workers skilled in emergency response when responding to a child abuse referral. (See Scott, supra, 27 Cal.App.4th at p. 141, 32 Cal.Rptr.2d 643.) However, even if County could be held liable for failing to obey this order, the record reveals no facts, disputed or otherwise, tending to prove a failure occurred in this case.

In particular, Jacqueline T. has failed to set forth any evidence that identifies what it means to be “skilled in emergency response.” Further, the evidence Jacqueline T. has identified does not tend to prove that County utilized social workers *unskilled* in emergency response when responding to referrals with respect to the alleged abuse of Roes 1 and 2.

Jacqueline T. points us to nothing in the record tending to reveal a failure of skills or training with respect to Yee, and the undisputed evidence suggests otherwise. At the time of his investigation into the alleged abuse, Yee had been a social worker for 21 years, and had received extensive ongoing training in

child abuse investigation.

With respect to Richards, Jacqueline T. points only to select portions of her deposition testimony where she admits to not being "aware of all the details of what [the DSS] manual says", to not knowing what the "[DSS] manual states" with respect to the significance to be given during an investigation (rather than during a referral) to a parent's history of substance abuse or criminal behavior, to receiving "more extensive training in Division 31 regulations ... after [her] investigation" in this case, and to not "hav[ing] [the department's protocols] memorized." Such evidence, however, without more, would not permit a reasonable person to conclude she was unskilled in emergency response. Rather, suggesting the contrary, undisputed evidence shows Richards held a degree in psychology and an advanced degree in social work, was assigned to County's emergency response unit in 1998, over a year before she began investigating the alleged abuse of Roes 1 and 2, and began receiving ongoing professional training in child abuse investigation at the time of her hiring in 1998.

*14 Based on this record, we conclude that, even viewing the evidence in a light favorable to Jacqueline T., as the law requires, no reasonable person could here find a breach of this duty. And such, Jacqueline T.'s argument based on DSS Manual regulation 31-101.2 provides no basis for holding County liable for negligence or negligence per se.

Accordingly, for the reasons set forth above, we conclude the grant of summary judgment to respondents was proper and, thus, affirm the judgment.

The judgment is affirmed.

We concur: POLLAK, Acting P.J., and SIGGINS, J.

FN* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

FN1. Sometime later in 1998, Jacqueline T. was advised by a friend, Laura N., that Roe 2 said her "pee pee" hurt because "N." touches her there. Jacqueline T. told Laura

N. that County was already investigating the alleged abuse, which had been reported by Minors' therapist, and requested that she call County to give this new information to the social worker in charge of the investigation. Laura N. did so, speaking to a man whose name she did not recall and giving him her phone number in case he later had questions. Laura N. did not hear from the man again.

FN2. During the CALICO interview, Roe 2 denied N. had sexually contacted or abused her, but described him as "really mean."

FN3. All references to a particular code section are to the section in effect on the date when the relevant conduct allegedly occurred.

FN4. Unless otherwise stated, all statutory citations herein are to the Government Code.

FN5. That Employees ultimately decided against initiating dependency proceedings does not render section 821.6 inapplicable. As both the statute and the case law make clear, the quasi-prosecutorial decision whether to initiate such proceedings-whatever that decision is-is immunized. (Ingram v. Flippo (1999) 74 Cal.App.4th 1280, 1293, 89 Cal.Rptr.2d 60 [district attorney's conduct was an exercise of prosecutorial discretion immunized under section 821.6 even though he decided not to prosecute an action].)

FN6. In arguing that County and Employees breached certain mandatory duties in violation of section 815.6, Jacqueline T. relies in her opening brief on several enactments that she did not rely upon before the trial court, including Penal Code sections 11165 and 11166, subdivision (i). Because Jacqueline T. failed to raise arguments based on these enactments below, we decline to consider them here. (Reves v. Kosha (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457.)

Jacqueline T. also concedes that certain enactments she relied upon in her opening brief-including California Code of Regulations Title 11, Division 1, Chapter 9, sections 901(1), 930.60 and 930.61-impose no mandatory duties on County. Given her

concession, we do not address these enactments here.

Finally, Jacqueline T. concedes she relied on several DSS manual regulations in her opening brief that "are substantially similar to and cumulative of other code sections that have been cited by plaintiffs, and [that] are also similar and mostly cumulative as between themselves," including regulations 31-110.3, 31-115, 31-120, 31-125.22 and 31-125.2. Again, given her concession, we do not address these cumulative regulations here.

FN7.Penal Code section 11164 was amended effective January 1, 2001. (Stats.2000 ch. 916, § 1, p. 5164.) References here to Penal Code section 11164 are to the statute as it read prior to amendment, when the alleged child abuse occurred.

FN8. Jacqueline T. acknowledges the language in Penal Code section 11166, subdivision (j) and subdivision (g), upon which she relies on appeal, is part of the current version of the statute rather than the version in effect when the alleged breach occurred. Jacqueline T. explains, however, that the language in subdivision (j) is nearly identical to that found in subdivision (i) of the prior version of the statute, and that the language in subdivision (g) is nearly identical to that found in subdivision (f) of the prior version of the statute, both of which were in effect at the relevant time and were relied upon below. We find Jacqueline T.'s reliance at various times on different versions of the same statute both confusing and frustrating. Nonetheless, rather than find waiver, which we are no doubt entitled to do, we give Jacqueline T. the benefit of the doubt and address the merits of her argument based on the version of the statute in effect during the relevant time period—from 1998 to 2000—which provided in relevant part:

"(a) Except as provided in subdivision (b), any child care custodian, health practitioner, employee of a child protective agency, child visitation monitor, firefighter, animal control officer, or humane society officer who has knowledge of or observes a child, in his or her professional capacity or within the scope

of his or her employment, whom he or she knows or reasonably suspects has been the victim of child abuse, shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. A child protective agency shall be notified and a report shall be prepared and sent even if the child has expired, regardless of whether or not the possible abuse was a factor contributing to the death, and even if suspected child abuse was discovered during an autopsy. For the purposes of this article, 'reasonable suspicion' means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse. For the purpose of this article, the pregnancy of a minor does not, in and of itself, constitute a basis of reasonable suspicion of sexual abuse. [¶] ... [¶]

"(f) Any other person who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse may report the known or suspected instance of child abuse to a child protective agency. [¶]

"(i) A county probation or welfare department shall immediately, or as soon as practically possible, report by telephone to the law enforcement agency having jurisdiction over the case, to the agency given the responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code, and to the district attorney's office every known or suspected instance of child abuse, as defined in Section 11165.6, except acts or omissions coming within subdivision (b) of Section 11165.2, or reports made pursuant to Section 11165.13 based on risk to a child which relates solely to the inability of the parent to provide the child with regular care due to the parent's substance abuse, which shall be reported only to the county welfare department. A county probation or welfare department also shall send a written report thereof within 36 hours of receiving the information concerning the incident to any agency to

which it is required to make a telephone report under this subdivision.”(Stats.1996, ch. 1081, § 3.5, pp. 7410-7412.)

FN9. The first report of abuse, received August 27, 1998, was cross-reported by Yee on September 26, 1998. It is unclear when the second report, received October 29, 1999, was cross-reported by Richards. The third report, received June 29, 2000, was cross-reported by Richards on July 7, 2000.

FN10. The version of Penal Code section 11166.3 in effect during the relevant dates provided in full:

“(a) The Legislature intends that in each county the law enforcement agencies and the county welfare or social services department shall develop and implement cooperative arrangements in order to coordinate existing duties in connection with the investigation of suspected child abuse cases. The local law enforcement agency having jurisdiction over a case reported under Section 11166 shall report to the county welfare department that it is investigating the case within 36 hours after starting its investigation. The county welfare department or social services department shall, in cases where a minor is a victim of actions specified in Section 288 of this code and a petition has been filed pursuant to Section 300 of the Welfare and Institutions Code with regard to the minor, in accordance with the requirements of subdivision (c) of Section 288, evaluate what action or actions would be in the best interest of the child victim. Notwithstanding any other provision of law, the county welfare department or social services department shall submit in writing its findings and the reasons therefor to the district attorney on or before the completion of the investigation. The written findings and the reasons therefor shall be delivered or made accessible to the defendant or his or her counsel in the manner specified in Sections 859 and 1430. The child protective agency shall send a copy of its investigative report and any other pertinent materials to the licensing agency upon the request of the licensing agency.

“(b) The local law enforcement agency having jurisdiction over a case reported under Section 11166 shall report to the

district office of the State Department of Social Services any case reported under this section if the case involves a facility specified in paragraph (5) or (6) of Section 1502 or in Section 1596.750 or 1596.76 of the Health and Safety Code and the licensing of the facility has not been delegated to a county agency. The law enforcement agency shall send a copy of its investigation report and any other pertinent materials to the licensing agency upon the request of the licensing agency.”(Stats.1988, ch. 898, § 1, pp. 2862-2863.)

FN11. Penal Code section 11165.7 (Stats.1992, ch. 459, § 1, pp. 1824-1825) provides in relevant part:

“(a) As used in this article, ‘child care custodian’ means a teacher; an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education; a classified employee of any public school who has been trained in the duties imposed by this article, if the school has so warranted to the State Department of Education; an administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; an administrator or employee of a public or private youth center, youth recreation program, or youth organization; an administrator or employee of a public or private organization whose duties require direct contact and supervision of children; a licensee, an administrator, or an employee of a licensed community care or child day care facility; a headstart teacher; a licensing worker or licensing evaluator; a public assistance worker; an employee of a child care institution including, but not limited to, foster parents, group home personnel, and personnel of residential care facilities; a social worker, probation officer, or parole officer; an employee of a school district police or security department; any person who is an administrator or presenter of, or a counselor in, a child abuse prevention program in any public or private school; a district attorney investigator, inspector, or

family support officer unless the investigator, inspector, or officer is working with an attorney appointed pursuant to Section 317 of the Welfare and Institutions Code to represent a minor; or a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of this code, who is not otherwise described in this section.

“(b) Training in the duties imposed by this article shall include training in child abuse identification and training in child abuse reporting. As part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees’ confidentiality rights.

“(c) School districts which do not train the employees specified in subdivision (a) in the duties of child care custodians under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided.

“(d) Volunteers of public or private organizations whose duties require direct contact and supervision of children are encouraged to obtain training in the identification and reporting of child abuse.”

FN12. The statute in effect during the relevant time provided: “As used in this article, ‘child protective agency’ means a police or sheriff’s department, a county probation department, or a county welfare department. It does not include a school district police or security department.”(Stats.1987, ch. 1459, § 16, p. 5521; repealed by Stats.2000, ch. 916, § 8, p. 5166.)

The current version of Penal Code section 11165.9, which did not become effective until January 1, 2001, provides: “Reports of suspected child abuse or neglect shall be made by mandated reporters to any police department, sheriff’s department, county probation department if designated by the county to receive mandated reports, or the county welfare department. It does not include a school district police or security department. Any of those agencies shall accept a report of suspected child abuse or neglect whether offered by a mandated reporter or another person, or referral by another agency, even if the agency to whom

the report is being made lacks subject matter or geographical jurisdiction to investigate the reported case, unless the agency can immediately electronically transfer the call to an agency with proper jurisdiction. When an agency takes a report about a case of suspected child abuse or neglect in which that agency lacks jurisdiction, the agency shall immediately refer the case by telephone, fax, or electronic transmission to an agency with proper jurisdiction.”(Stats.2000, ch. 916, § 8, p. 5166.)

FN13. Welfare and Institutions Code section 16501, subdivision (f) provides:

“(f) As used in this chapter, emergency response services consist of a response system providing in-person response, 24 hours a day, seven days a week, to reports of abuse, neglect, or exploitation, as required by Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code for the purpose of investigation pursuant to Section 11166 of the Penal Code and to determine the necessity for providing initial intake services and crisis intervention to maintain the child safely in his or her own home or to protect the safety of the child. *County welfare departments shall respond to any report of imminent danger to a child immediately and all other reports within 10 calendar days.* An in-person response is not required when the county welfare department, based upon an evaluation of risk, determines that an in-person response is not appropriate. This evaluation includes collateral, contacts, a review of previous referrals, and other relevant information, as indicated.”(Emphasis added.) (Stats.1996, ch. 1083, § 9, p. 7595.)

FN14. DSS Manual regulation 31-101.2 provides: “The social worker responding to a referral shall be skilled in emergency response.”

Cal.App. 1 Dist., 2007.

Jacqueline T. v. Alameda County Child Protective Services

--- Cal.Rptr.3d ---, 2007 WL 2729323 (Cal.App. 1 Dist.), 07 Cal. Daily Op. Serv. 11,352, 2007 Daily Journal D.A.R. 14,709

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▽
 People v. Carskaddon
 Cal.

THE PEOPLE, Respondent,
 v.
 LEROY CARSKADDON, Appellant.
 Crim. No. 6140.

Supreme Court of California
 Nov. 19, 1957.

HEADNOTES

(1) Statutes § 193--Construction--Penal Code.
 Penal provisions are to be construed according to the fair import of their terms with a view to effect their objects and promote justice. (Pen. Code, § 4.)

See Cal.Jur., Statutes, § 179; Am.Jur., Statutes, § 413.

(2) Vagrancy § 2--Annoying Children--Purpose of Statute.

The purpose of Pen. Code, § 647a, subd. (1), declaring that a person who annoys or molests a child is a vagrant, is the protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of such offenders.

See Cal.Jur., Vagrancy, § 2 et seq.; Am.Jur., Vagrancy, § 2 et seq.

(3) Vagrancy § 2--Annoying Children--Construction of Statute.

'Annoy' and 'molest' are synonymously used in Pen. Code, § 647a, subd. (1), declaring that a person who annoys or molests a child is a vagrant; they generally refer to conduct designed to disturb or irritate, especially by continued or repeated acts, or to offend, and as used in the code section they ordinarily relate to offenses against children, with a connotation of abnormal sexual motivation of the offender.

(4) Vagrancy § 2--Annoying Children--Elements of Offense.

Ordinarily the annoyance or molestation which is forbidden by Pen. Code, § 647a, subd. (1), declaring that a person who annoys or molests a child is a vagrant, is not concerned with the state of the child's mind, but it is the objectionable acts of defendant that

constitute the offense; if his conduct is so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would annoy or molest within the purview of the code section.

(5) Vagrancy § 5--Annoying Children--Evidence.

A conviction of vagrancy for annoying or molesting a 6-year-old girl (Pen. Code, § 647a, subd. (1)) was not sustained by evidence that defendant was in the company of the girl and a 4-year-old boy in a public park, that he walked down a public street with the girl by his side, and that when stopped and queried by an officer defendant stated that the girl was lost and he was taking her home, the mere circumstance that defendant and the girl were apparently not walking in the direction of the girl's home did not show that defendant was not innocently befriending the girl nor indicate that he did not intend later to take the girl home after going to 'the river to show her' (which was the girl's statement not completed in the officer's testimony).

(6) Statutes § 118--Construction--Penal Statutes.

Penal statutes include only those offenses coming clearly within the import of the language used, and will not be given application beyond their plain intent.

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. Raymond T. Coughlin, Judge. Reversed.

Prosecution for annoying or molesting a child. Judgment of conviction reversed.

COUNSEL

Robert O. Fort, under appointment by the Supreme Court, for Appellant.

Edmund G. Brown, Attorney General, Doris H. Maier and J. M. Sanderson, Deputy Attorneys General, for Respondent.

SPENCE, J.

Defendant appeals from a judgment of conviction for violation of section 647a, subdivision (1), of the Penal Code. He contends that the evidence is insufficient to sustain his conviction. The evidence is uncontradicted and although we have viewed it in the light most favorable to the prosecution (People v.

Moore, 137 Cal.App.2d 197, 200 [290 P.2d 40]), we have nevertheless concluded that defendant's contention must be sustained.

On April 19, 1956, at Southside Park in Sacramento, Anthony Bakazan stopped his automobile at a street curb to eat lunch in his car. He saw defendant take a little girl, aged 6, and a little boy, aged 4, underneath a large tree about 30 feet inside the park. They sat there a short time; then *425 Bakazan saw the boy leave while the girl remained. As Bakazan walked back and forth a few times, watching defendant, the latter would sometimes so move that the tree briefly obscured Bakazan's view. However, Bakazan managed to keep 10 to 30 feet distant from defendant and the girl, and he had a full view of defendant for all but about a minute of the 10 minutes that they stayed under the tree. Bakazan did not see defendant touch the girl.

After some 10 minutes under the tree, defendant and the girl walked to a concession stand where defendant bought the girl an ice-cream bar. Bakazan followed, keeping the two under observation at all times. He never spoke to defendant. Defendant and the girl proceeded up the street in a direction away from the park and toward the Sacramento River. Bakazan continued to follow and to watch, until a motorcycle officer came along. Bakazan called the officer's attention to defendant and the girl. The officer turned his motorcycle and approached defendant. Defendant saw the officer and started to walk ahead of the girl when the officer stopped him. In response to the officer's queries, defendant stated that the girl was not his but that she was lost and he was taking her home, after which he intended boarding a bus to another part of the city. In defendant's presence, the officer then asked the girl if defendant was taking her home. The officer testified that she replied, 'No, he was taking her down the river to show her ___'. The officer's testimony was interrupted at this point, and he did not complete his recital of the girl's statement. The officer did not see defendant make any motions with his arms or any other part of his body toward the girl but only observed them 'walking side by side down the street.'

Section 647a, subdivision (1), of the Penal Code provides, as here pertinent: 'Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable. ...' (1) Penal provisions are to be construed according to the fair import of their terms, with a view to effect their objects and to promote justice. (Pen. Code, § 4; People v. Valentine, 28 Cal.2d 121, 142 [169 P.2d 1]; Ex parte

Galivan, 162 Cal. 331, 333 [122 P. 961]; Downing v. Municipal Court, 88 Cal.App.2d 345, 349-350 [198 P.2d 923].)

(2) The primary purpose of the above statute is the 'protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter.' (People v. Moore, supra, 137 Cal.App.2d 197, 199; *426 People v. Pallares, 112 Cal.App.2d Supp. 895, 900 [246 P.2d 173].) (3) The words 'annoy' and 'molest' are synonymously used (Words and Phrases, perm. ed., vol. 27, 'molest'); they generally refer to conduct designed 'to disturb or irritate, esp. by continued or repeated acts' or 'to offend' (Webster's New Inter. Dict., 2d ed.); and as used in this statute, they ordinarily relate to 'offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender.' (People v. Pallares, supra, p. 901.) (4) Ordinarily, the annoyance or molestation which is forbidden is 'not concerned with the state of mind of the child' but it is 'the objectionable acts of defendant which constitute the offense,' and if his conduct is 'so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would 'annoy or molest' within the purview of the statute. (People v. McNair, 130 Cal.App.2d 696, 697-698 [279 P.2d 800].)

(5) Applying these principles to the record here, we find no evidence to support a finding that defendant had committed any objectionable act which would unhesitatingly irritate a normal person. The cases of People v. McNair, supra, 130 Cal.App.2d 696, and People v. Moore, supra, 137 Cal.App.2d 197, are therefore distinguishable. In each of those cases defendant committed a lewd and obscene act either in front of the child or with the child. No act of that type is shown by the present record. Rather it only appears that defendant was in the company of a 6-year-old girl and a 4-year-old boy in a public park, that he walked down a public street with the little girl by his side, and that when stopped and queried by the officer, defendant stated that the girl was lost and he was taking her home. It is true that the girl's mother testified as to their home address, which apparently was not in the direction in which defendant and the girl were walking. But such circumstance alone does not show that defendant was not innocently befriending the girl nor indicate that he did not intend later to take the girl home unharmed after going to 'the river to show her ___'. The statement of the girl was not completed in the officer's testimony and the record does not disclose the reason for the interruption.

In short, there is no substantial evidence of anything more than friendly noncriminal activity on the part of defendant toward the girl. Any mere suspicion that defendant might have intended to annoy or molest the girl at a later time would rest wholly in the realm of conjecture and would be insufficient *427 to sustain a conviction of the offense with which he was charged. (6) As was said in DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139, at page 156 [187 P.2d 769, 175 A.L.R. 382]: 'Penal statutes will not be given application beyond their plain intent. Such acts include only those offenses coming clearly within the import of the language.'

The judgment is reversed.

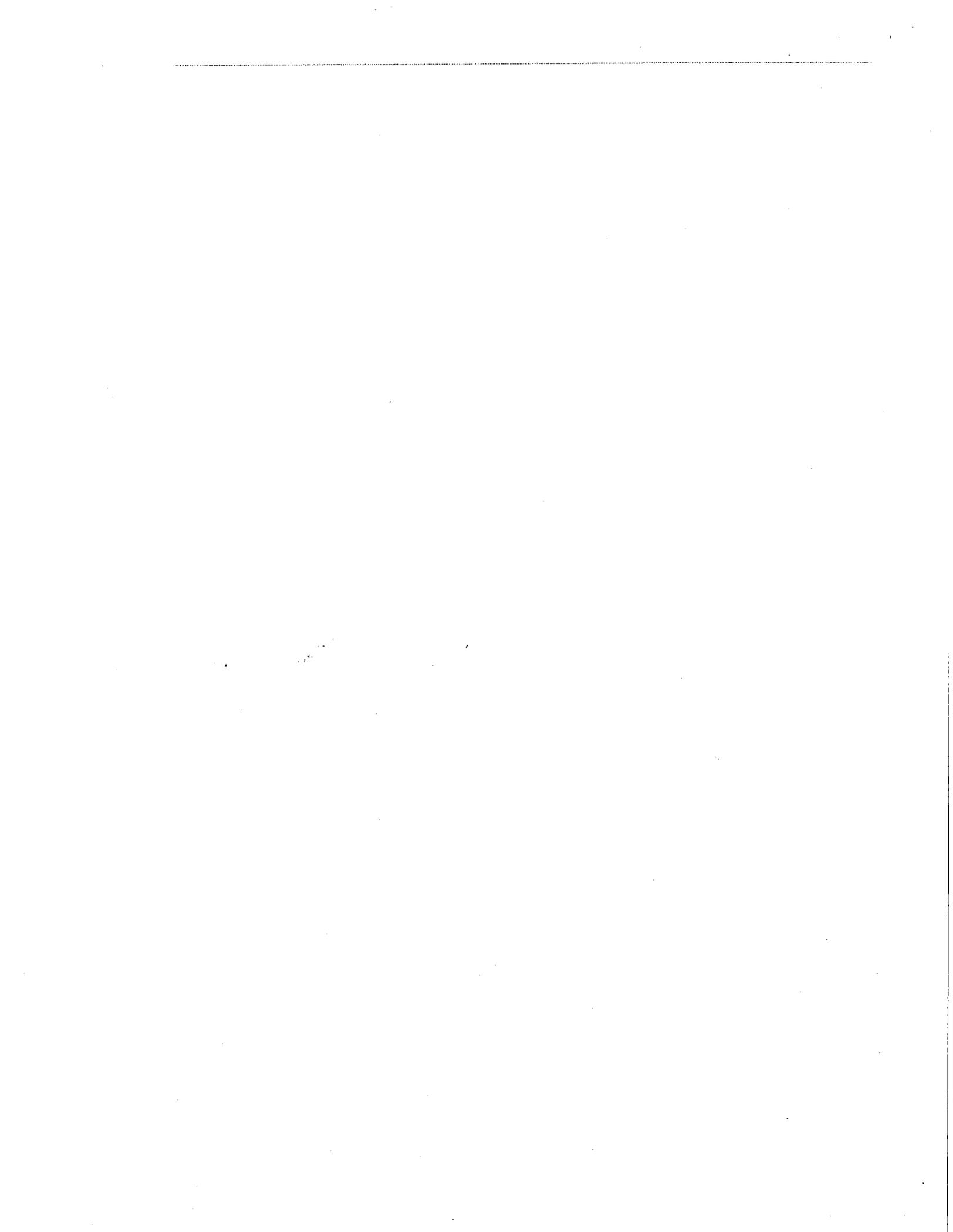
Gibson, C. J., Shenk, J., Carter, J., Traynor, J., Schauer, J., and McComb, J., concurred.

Cal.

People v. Carskaddon

49 Cal.2d 423, 318 P.2d 4

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C

THE PEOPLE, Plaintiff and Respondent,
v.
ARTHUR E. HODGES et al., Defendants and
Appellants.
No. Crim. A. No. 121292.

Appellate Department, Superior Court, San Diego
County, California.

Aug 21, 1992.

SUMMARY

A pastor and assistant pastor at a church, who were also the president and principal of a school, were convicted of violation of the Child Abuse and Neglect Reporting Act (Pen. Code, § 11166, subd. (a)), based on evidence that defendants were acting in their capacity as child care custodians when a student sought help regarding molestation by her stepfather, and defendants failed to report it. (Municipal Court for the San Diego Judicial District of San Diego County, No. M569488, H. Ronald Domnitz, Judge.)

The appellate department of the superior court affirmed. The court held that the evidence was sufficient to support the jury's verdict that defendants were acting in their capacity as child care custodians under Pen. Code, § 11165.7. The victim was a student of the school, and defendants were involved in running it as well as holding pastoral positions with the church operating the school. The court further held that defendants' conduct was not protected religious activity under U.S. Const., 1st Amend., even if motivated by sincere religious beliefs. The court also held that the application of the Child Abuse and Neglect Reporting Act to defendants did not constitute excessive governmental entanglement with religion. The comprehensive reporting requirement was designed to ensure the health and safety of children and fulfills a vital and appropriate secular purpose. (Opinion by Moon, Acting P. J., with Tobin and Murphy, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Infants § 16--Offenses Against Infants--Child Abuse Reporting Act-- Application to Pastors at Religious School.

In a prosecution *21 of a pastor and assistant pastor at a church, who were also the president and principal of a school, for violation of the Child Abuse and Neglect Reporting Act (Pen. Code, § 11166, subd. (a)), the evidence was sufficient to support the jury's verdict that defendants were acting in their capacity as child care custodians when a student sought help regarding molestation by her stepfather. Under Pen. Code, § 11165.7, a child care custodian means a teacher, administrative officer, or supervisor of child welfare and attendance of any public or private school, and the jury was so instructed. The victim was a student of the school, and defendants were involved in running it as well as holding pastoral positions with the church operating the school.

(2a, 2b) Constitutional Law § 115--Due Process--Statutory Vagueness or Overbreadth--Child Abuse Reporting Act--Application to Pastors at Religious School.

The application of Pen. Code, § 11166, subd. (a), the Child Abuse and Neglect Reporting Act, did not violate due process by failing to give adequate notice of the reporting obligation to a pastor and assistant pastor of a church, who were also the president and principal of a religious school, and who were prosecuted under the act. All the relevant terms of the statute are defined therein with sufficient definiteness to give the constitutionally required degree of notice to those subject to its requirements. There was an obvious intent on the part of the Legislature not to create any exceptions to the reporting requirement, and the evidence established that defendants were aware of the law and were aware they were mandatory reporters under the law.

(3) Constitutional Law § 113--Due Process--Statutory Vagueness or Overbreadth--General Principles.

In considering whether a legislative proscription is sufficiently clear to satisfy the requirements of fair notice, courts look first to the language of the statute, then to its legislative history, and finally to judicial construction of the statutory language. The law requires citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction, and underlying

(Cite as: 10 Cal.App.4th Supp. 20)

legislative purpose. These principles suggest a legislative enactment must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears on the face of the statute. A statute should be sufficiently certain that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be void for uncertainty if any reasonable and practical construction can be given to its language.

(4) Constitutional Law § 53--Freedom of Religion--Conduct.

Two types of religious freedom are guaranteed by U.S. Const., 1st Amend.: *22 the freedom to believe and the freedom to act. The freedom to believe is absolute, but the freedom to act is not. Interference with religion by government action may be either direct or indirect. Direct interference is rare and results when the government enacts legislation directed specifically at a religious practice. Indirect interference is more often the case, and it occurs when a facially neutral statute impacts a religious practice. General regulations having an otherwise valid object are not necessarily rendered invalid by reason of some incidental effect on religious beliefs or observances; a balancing test is employed. Although a determination of what is a religious belief or practice entitled to constitutional protection may present a delicate question, the very concept of ordered liberty precludes allowing every person to make his or her own standards on matters of conduct in which society as a whole has important interests.

[See 7 Witkin, Summary of Cal. Law (9th ed.) Constitutional Law, § 376.]

(5a, 5b) Constitutional Law § 53--Freedom of Religion--Application of Child Neglect Reporting Act--Pastors at Religious School.

The failure of a pastor and assistant pastor of a church, who were also president and principal of a religious school, to report known child abuse as required by Pen. Code, § 11166, subd. (a), was not protected religious activity under U.S. Const., 1st Amend., even if motivated by sincere religious beliefs. The statute furthered a compelling state interest, the possible impairment of the physical or mental health of children. If defendants were exempt from the mandatory requirements of the reporting act, the act's purpose would be severely undermined, as there was no indication teachers and administrators of religious schools would voluntarily report known or suspected child abuse. Thus, children in those schools

would not be protected. Moreover, the compelling state interest in the protection of children from abuse overrode any burden imposed on defendants' right to free speech, and forbade them to keep silent regarding child abuse.

[Validity, construction, and application of state statute requiring doctor or other person to report child abuse, note, 73 A.L.R.4th 782. See also Cal.Jur.3d (Rev), Constitutional Law, § 249; 7 Witkin, Summary of Cal. Law (9th ed. 1988) § 377.]

(6) Constitutional Law § 53--Freedom of Religion--Free Exercise.

The determination whether a statute unconstitutionally violates the *23 free exercise clause (U.S. Const., 1st Amend.) requires analysis of three factors: (1) the magnitude of the statute's impact on the exercise of the religious belief; (2) the existence of a compelling state interest justifying the burden imposed on the exercise of religious beliefs; and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the statute. The burden of proof with respect to the first prong lies with the plaintiff; if satisfied, the burden of proof with respect to the last two prongs shifts to the defendant.

(7) Constitutional Law § 53--Freedom of Religion--Establishment Clause.

To survive a challenge under the establishment of religion clause (U.S. Const., 1st Amend.), a statute must: have a secular purpose, neither advance nor inhibit religion as its principal primary effect, and not produce excessive governmental entanglement with religion.

(8) Constitutional Law § 53--Freedom of Religion--Establishment Clause-- Application of Child Neglect Reporting Act to Religious School.

The application of the Child Abuse and Neglect Reporting Act (Pen. Code, § 11166, subd. (a)) to the pastor and assistant pastor of a church, who were also officials of the related religious school, did not constitute excessive governmental entanglement with religion. The comprehensive reporting requirement was designed to ensure the health and safety of children and fulfills a vital and appropriate secular purpose. Religious freedom is not absolute, and the act is limited in its intrusiveness and does not create an entanglement concern. The compelling state

(Cite as: 10 Cal.App.4th Supp. 20)

interest furthered by the act justified the interference with defendants' religious practices when defendants were acting in the capacity of child care custodians within the meaning of the statute.

COUNSEL

Charles E. Craze for Defendants and Appellants.

Edwin L. Miller, Jr., District Attorney, Richard Neely, Assistant District Attorney, Brian Michaels, Chief Deputy District Attorney, and Caryn Rosen Viterbi, Deputy District Attorney, for Plaintiff and Respondent.

MOON, Acting P. J.

In what appears to be a case of first impression, we are asked to determine whether appellants, a pastor and assistant pastor of *24 the South Bay United Pentecostal Church, who are also the president and principal of the South Bay Christian Academy, were properly convicted of violating the Child Abuse and Neglect Reporting Act (Reporting Act), Penal Code section 11166, subdivision (a). [FN1] The statute provides in pertinent part, "(a) Except as provided in subdivision (b), any child care custodian ... who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible"

FN1 All further statutory references are to the Penal Code unless otherwise indicated.

Appellants raise several challenges to their convictions: (1) there was insufficient evidence to find they are child care custodians within the scope of the statute; (2) the statute, section 11166, subdivision (a), violates due process by failing to give adequate notice that pastors who are involved in church schools are within the scope of the statute; (3) the statute as applied violates both the federal and state Constitutions by infringing on appellants' rights to the free exercise of religion and freedom of speech; and (4) the reporting statute violates the establishment clause of the First Amendment of the United States Constitution.

For the reasons set forth below, we affirm the

convictions.

Facts

At trial, the victim, 20-year-old Christine G., testified she had attended South Bay Christian Academy, a school operated by the South Bay United Pentecostal Church. The school and church were located in the same building. Christine testified she had been a student at the school from age seven until she graduated from the high school at age seventeen. Appellant Arthur E. Hodges was president of the school (as well as the pastor of the church), and appellant, George Grant Nobbs was principal (and assistant pastor). Christine went to see appellant Hodges because he was the spiritual leader of the church and the head of the school.

Christine testified that when she was 17 years old (in March 1988) she decided to seek help from appellant Hodges by telling him her stepfather, Lyn M., a minister in the church, had been molesting her for many years. Christine testified she confided in a classroom teacher who, in turn, made an appointment with Mr. Hodges during the school day. Appellant Nobbs gave Christine permission to leave class early on the day of the appointment to see Mr. Hodges.

Christine testified she told Mr. Hodges what her stepfather had been doing to her: he touched her breasts and private parts. She testified Mr. Hodges *25 told her that he believed her. Christine did not want him to tell her stepfather, but Mr. Hodges said that he would have to be confronted. Mr. Hodges told Christine he would make arrangements for her to leave home when he talked to her stepfather. Christine went home and stayed in her room.

Christine testified she met with Mr. Hodges the day after he spoke with her stepfather. He told her that her stepfather confessed to everything and that he would be handling the situation. Mr. Hodges told Christine not to tell anyone about what her stepfather had done to her.

A few days later Mr. Hodges called Christine back into his office. He told her he had sent her stepfather to a retreat. Mr. Hodges handed her a letter of apology from her stepfather. This was approximately two weeks after their initial meeting.

Mr. Hodges wanted Christine's mother and stepfather to come into the office after she read the letter. Mr. Hodges wanted Christine to go home with her parents

(Cite as: 10 Cal.App.4th Supp. 20)

because she was seeing her boyfriend against his instructions. Christine told Mr. Hodges she did not want to talk to her parents. He insisted, and they came into the office and spoke with her. Christine pleaded with Mr. Hodges not to make her go home with them because she was afraid of her stepfather. Mr. Hodges arranged to have her parents pick her up from school the next day and bring her home. Instead, Christine ran away. She also told others about the situation even though Mr. Hodges told her not to.

After running away, Christine received instructions to return to see Mr. Hodges. She went to his office during school hours. Appellant Nobbs was also there. Mr. Hodges told her unless she returned home she would not be allowed to return to school and she would not graduate. This meeting was held approximately a week and a half after Christine was given the letter. Christine returned home and left immediately after graduation.

Raylene M., Christine's mother, testified she was unaware her husband had been molesting her daughter until she was called to the church by Mr. Hodges. She stated Mr. Hodges insisted he handle the situation within the church. She testified Mr. Nobbs was aware of the facts, and she often went to him for strength and comfort.

Detective Duffy, a child abuse detective for the San Diego Police Department, testified that on August 19, 1988, he was assigned to follow up on a telephone call made by Christine regarding molest allegations. He stated he personally interviewed Christine. His partner interviewed her older sister, Michelle. After the interview, he decided to speak with appellants. This was *26 in September 1988. He and his partner went to the school and spoke first with the principal, Mr. Nobbs. After they informed Mr. Nobbs of their investigation, Mr. Nobbs stated he was not at liberty to talk about the situation alone; he would have to call his superior, Mr. Hodges.

Mr. Hodges came down from his office and introduced himself as the president of the school. The officer admonished him. Mr. Hodges told the detective in general terms he was aware of the allegations of molest, that Christine had disclosed to him many of the details, and he had handled the situation regarding Christine's stepfather. When asked why he did not report the information to the police office or child protective services or if he

knew he was mandated to report, Mr. Hodges told the officer he knew of the reporting laws, and he understood he was a mandated reporter. Mr. Hodges told the officer he wanted to take care of the matter within the church. Mr. Hodges stated he disciplined the stepfather by having him write a letter of apology to the victim and by having the stepfather confess in front of the entire congregation. Additionally, Mr. Hodges took away his ministerial license. Mr. Hodges also told the officer he instructed Christine to return home; if she did not, she would not graduate.

Detective Duffy then went to Mr. Nobbs's office. He admonished Mr. Nobbs and asked him if he was aware of the allegation of molest. Mr. Nobbs told the officer he was aware of the situation. The officer also asked him why he did not report the molest since Christine was a student at his school. Detective Duffy testified Mr. Nobbs admitted he was aware that he was a mandated reporter and knew the laws. He did not report the suspected abuse because he and Mr. Hodges wanted to resolve the situation within the church. Mr. Nobbs told the officer he, as principal of the school, could not have allowed Christine to attend school if she was not living at home. He also stated he and Mr. Hodges talked to Christine about not being able to graduate unless she returned home.

Mr. Hodges testified he is the spiritual leader of the South Bay United Pentecostal Church. He stated he met with Christine in his office, the pastoral office of the church. The meeting began with a prayer. His wife was present. He stated Christine told him she was having trouble forgiving her stepfather. She told him her stepfather was hugging her wrong, letting his hand brush against her breast. She also told Mr. Hodges she felt her stepfather's penis touching her from behind.

Mr. Hodges told Christine they would have to confront her stepfather. Christine told Mr. Hodges she did not want the police involved. He stated *27 that after talking with Christine, he prayed and sought advice. He did not know he was supposed to contact the police. Even more important, he did not contact the police because he believed that his role in the matter was a pastoral one, specifically dealing with Christine's inability to forgive her stepfather. He did not believe the incidents described by Christine were "sexual abuse"; he believed they were sins. He stated he had to follow the Scriptures concerning disciplining a Christian.

Mr. Nobbs testified he is the assistant pastor of South Bay United Pentecostal Church. The major scope of his duties is to assist the pastor. He is the elder of the division of education. He is principal of the South Bay Christian Academy, responsible for the day-to-day operation of the school. He stated he discussed the situation with Mr. Hodges primarily in the context of his taking over Lyn M.'s ministerial duties. He stated Christine would have been able to attend school and graduate so long as she was living in harmony at home. If her parents had allowed her to live outside the family home, he would have no objections to her attending school and graduating. Her parents, however, wanted her home. He believed that when he received information concerning what had taken place between Christine and her stepfather, he was acting in a pastoral capacity as assistant pastor. Mr. Hodges told him there had been inappropriate touching by the stepfather. He knew no other details.

The jury found both appellants guilty as charged.

Issues

(1) *Was there substantial evidence to support the convictions?*

(1) Appellants first contend they were not acting as "child care custodians" within the meaning of the statute. According to appellants, Mr. Hodges was counseling Christine, a member of the church with a spiritual problem, as the pastor of the church. Appellants argue most of the meetings were not during school hours. They also argue Mr. Nobbs was not acting as a child custodian, but rather was called to be informed that Christine's stepfather would be relieved of his ministerial duties and Mr. Nobbs would have to assume them.

The jury was instructed on the definition of a child care custodian pursuant to section 11165.7: "[C]hild care custodian' means a teacher; ... administrative officer, supervisor of child welfare and attendance ... of any public or private school." No objection to this instruction was raised by any party. *28

The record reflects substantial evidence to support the jury's finding that appellants were child care custodians. The school attended by the victim, South Bay Christian Academy, was operated by South Bay United Pentecostal Church. Both facilities shared the same building. While most students were members of the church, not all students were Religious and academic classes were taught. Appellants were

involved in running the school as president and principal (as well as holding pastoral positions with the church). Appellant Nobbs took care of the day-to-day management of the school while appellant Hodges had overall responsibility for decisions concerning the school. Hodges presented diplomas at graduation which were signed by both Hodges and Nobbs.

Christine testified she sought help from Hodges when she was age 17 regarding her stepfather's continued molestation of her. She was excused from school early to see Hodges. A teacher made the appointment for her and Nobbs gave her permission to leave class early for the appointment. Hodges told Christine how he intended to handle the situation. Both appellants at one time told Christine if she did not move back home she would be unable to finish school and graduate. Christine testified she sought Hodges's help because he was in charge of the school.

The court must accept the evidence in the light most favorable to the judgment, and the court must presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Reilly* (1970) 3 Cal.3d 421 [90 Cal.Rptr. 417, 475 P.2d 649].)

Here there is ample evidence to support the jury's verdict and decision that when Christine sought help, appellants were acting in their capacity as child care custodians.

(2) *Does the statute fail to provide adequate notice?*

(2a) Appellants next contend the statute, section 11166, subdivision (a), violates due process as applied to them, as it fails to give adequate notice of the obligation to report. Appellants rely on *Lambert v. California* (1957) 355 U.S. 225 [2 L.Ed.2d 228, 78 S.Ct. 410]. In *Lambert*, a convicted felon was convicted of a Los Angeles Municipal Code ordinance which required any convicted felon to register with the chief of police within five days of arriving in Los Angeles. The question before the court was, "whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." (*Id.* at p. 227 [2 L.Ed.2d at p. 230].) The court held it did since the law did not provide an opportunity to *29 either avoid the consequences of the law or to defend in any prosecution brought under it.

(3) In considering whether a legislative proscription is sufficiently clear to satisfy the requirements of fair notice, we look first to the language of the statute, then to its legislative history, and finally to the California decisions construing the statutory language. The law requires citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction and underlying legislative purpose. (*Walker v. Superior Court* (1988) 47 Cal.3d 112 [253 Cal.Rptr. 1, 763 P.2d 852].)

These principles suggest a legislative enactment must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears on the face of the statute. A statute should be sufficiently certain that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be void for uncertainty if any reasonable and practical construction can be given to its language. (*Walker v. Superior Court, supra*, 47 Cal.3d 112.)

(2b) As respondent notes, the terms "child," "child abuse," and "child protective agency" are all defined in the Reporting Act, as is "child care custodian." The definition of "child care custodian" includes "an administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school." (§ 11165.7.) The intent of the Reporting Act, as stated by the Legislature, is to protect children from abuse, including neglect, willful cruelty, or unjustifiable punishment and unlawful corporal punishment or injury.

The Legislature has been sufficiently definite in drafting the Reporting Act to give the constitutionally required degree of notice to those subject to its requirements.

Appellants also contend the statute as applied in this case is insufficiently specific given its impact on activities potentially subject to First Amendment protection. According to appellants, their right to free speech is compromised, since the statute compels appellants to speak what they do not wish to speak. Appellants argue they were obligated by the dictates of their faith and precepts stemming therefrom not to disclose to the community the contents of pastoral communications with Christine. Appellants' faith requires that matters involving dissension with the

families of the congregation be handled by the church. The statute, according to appellants, does not clearly manifest a legislative intent to extend the mandatory reporting requirement to religious personnel who are engaged in the operation of a school and who *30 have not had training or education in the area of child abuse detection. Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression and/or conduct sheltered by the First Amendment, the vagueness doctrine demands a greater degree of specificity than in other respects. (*Smith v. Goguen* (1974) 415 U.S. 566 [39 L.Ed.2d 605, 94 S.Ct. 1242].)

Appellants' position is not persuasive. The statute is very carefully worded to inform any child care custodian (which is also very clearly defined) in any public or private school that he or she must report any incident of suspected child abuse. There was an obvious intent on the part of the Legislature not to create any exceptions to the reporting requirement. The statute is sufficiently specific to defeat a constitutional attack based on the vagueness doctrine. In any event, the evidence here established that appellants were aware of the law and were aware they were mandatory reporters under that law.

(3) *Does the statute, as applied, violate the free exercise of religion clause or free speech clause?*

Appellants next contend the statute, as applied in this case, violates the free exercise of religion clause of the United States Constitution. The First Amendment provides that Congress "shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

(4) The United States Supreme Court has established certain principles for determining whether conduct rooted in religious belief is protected by the free exercise clause. The First Amendment guarantees two types of religious freedom: the freedom to believe and the freedom to act. It is well settled that the freedom to believe is absolute, while the freedom to act is not. (See *Reynolds v. United States* (1879) 98 U.S. 145 [25 L.Ed. 244] [polygamy convictions upheld]; *Sherbert v. Verner* (1963) 374 U.S. 398 [10 L.Ed.2d 965, 83 S.Ct. 1790] [law conditioning unemployment benefits on willingness to work on petitioner's religious day struck down].)

Interference with religion by government action may

(Cite as: 10 Cal.App.4th Supp. 20)

be either direct or indirect. Direct interference is rare and results when a government enacts legislation directed specifically at a religious practice. Indirect interference is more often the case, and it occurs when a facially neutral statute impacts a religious practice. General regulations having an otherwise valid object are not necessarily rendered invalid by reason of some incidental effect on religious beliefs or observances; a balancing test is employed. (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 376, p. 548.) *31 Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his or her own standards on matters of conduct in which society as a whole has important interests. (*Wisconsin v. Yoder* (1972) 406 U.S. 205 [32 L.Ed.2d 15, 92 S.Ct. 1526].)

(5a) The issue, then, becomes whether appellants' failing to report known child abuse as required by the statute and instead choosing to handle the problem within the church, even if motivated by sincere religious beliefs, is protected religious activity under the First Amendment.

(6) In order to determine whether a statute unconstitutionally violates the free exercise clause, the United States Supreme Court requires analysis of the following three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of religious belief; and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the statute. (*Callahan v. Woods* (1984) 736 F.2d 1269.) The burden of proof with respect to the first prong lies with plaintiff; if satisfied, the burden of proof with respect to the last two prongs shifts to defendant. (*Callahan, supra*, at pp. 1272- 1275.)

(5b) Here, the trial court found the statute did impact on appellants' sincerely held religious beliefs. However, the lower court also found that the statute furthered a compelling state interest—the possible impairment of the physical or mental health of children. In *People ex rel. Eichenberger v. Stockton Pregnancy Control Medical Clinic, Inc.* (1988) 203 Cal.App.3d 255 [249 Cal.Rptr. 762], the court was faced with the issue whether reporting consensual sexual conduct of minors would violate their right to

privacy. The court found no constitutional violation stating, "We have no doubt that the reporting to a child protective agency of a suspected violation of subdivision (a) of section 288, a felony, serves both a compelling ... and also significant state interest One compelling state interest is the apprehension of the perpetrator of a felony offense. A significant state interest not present in the case of an adult [where constitutional privacy rights are claimed] is the detection and prevention of child abuse." (*Id.*, at p. 241.)

Respondent relies on *North Valley Baptist Church v. McMahon* (E.D.Cal. 1988) 696 F.Supp. 518, as being factually similar to the case at bar. In *North Valley*, a religious group operating a preschool challenged the constitutionality of the California Child Care Facilities Act (*32 Health & Saf. Code, § 1596.70 et seq.) By this act, the State Department of Social Services is authorized to establish, administer, and monitor a comprehensive program applicable to all day care centers. The act does not provide for distinctive treatment for religiously affiliated day care centers. The North Valley Baptist Church claimed it should be exempt from the act's licensing scheme because to comply would interfere with its constitutional right to "minister to the needs of the people without interference from government." (*North Valley, supra*, 696 F. Supp. at p. 522.) In analyzing whether the act unconstitutionally interfered with the church's right to free exercise of religion, the court first concluded that the licensure requirement did impose a substantial burden upon the plaintiff's religious expression. However, in spite of this burden the court held: "According to its stated purpose, the licensing requirement of the Child Care Facilities Act is designed to protect the health and safety of children receiving care outside their home. Without hesitation, the court finds this to be a compelling state interest of the highest order." (*Id.*, at p. 526.)

Here, too, appellants claim the school is an integral part of their church ministry and to comply with the reporting statute would threaten substantial impairment of the exercise of the Pentecostal faith. The court in *North Valley* rejected that argument, as does this court. The statute in no way infringes on appellants' religious practice when they are acting solely in the capacity of pastors. However, when, as here, a student seeks assistance from them as administrators of the school, their obligation under the statute arises. While the distinction between the

(Cite as: 10 Cal.App.4th Supp. 20)

two positions may not always be clear, given the compelling state interest served by the Reporting Act, if the information comes to a teacher/principal/clergyman in any way through the school setting, reporting is mandatory. The compelling state interest furthered by the reporting statute, protecting children from child abuse, justifies any burden on appellants' religious practice.

The mere fact that a petitioner's religious practice is burdened by a governmental program does not mean an exception accommodating that practice must be granted. The state may justify an inroad on religious liberty by showing it is the least restrictive means of achieving some compelling state interest. (*Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707 [67 L.Ed.2d 624, 101 S.Ct. 1425].)

Here, if appellants are held to be exempt from the mandatory requirements of the Reporting Act, the act's purpose would be severely undermined. There is no indication teachers and administrators of religious schools would *33 voluntarily report known or suspected child abuse. Children in those schools would not be protected. The protection of all children cannot be achieved in any other way.

Appellants also contend that the statute impermissibly infringes on their First Amendment right to free speech in that the statute compels speech and is a content-based regulation. Respondent notes this objection was not raised in the court below, but also argues the same analysis given to the free exercise challenge must be applied to this free speech challenge—does the compelling state interest in the protection of children from abuse override the burden imposed on appellants' right to free speech? This court concludes it does; there is no other less intrusive way to satisfy the act.

(4) *Does the statute, as applied, violate the establishment clause of the First Amendment?*

(7) To survive an establishment of religion clause challenge, a statute must have a secular purpose, neither advance nor inhibit religion as its principal or primary effect, and not produce excessive governmental entanglement with religion. (*Lemon v. Kurtzman* (1971) 403 U.S. 602 [29 L.Ed.2d 745, 91 S.Ct. 2105].)

(8) Appellants argue the Reporting Act constitutes excessive governmental entanglement with religion.

According to appellants, the court, by refusing instructions that appellants at all times were acting as clergy and not as child care custodians, took upon itself to define what is religious and what is secular among the varied activities of a pastor. The court, in effect, determined the activities of clergyman and child care custodians, in a church-operated school, are mutually exclusive. The court, in effect, has barred a pastor from religious counseling of suspected child abuse among the members of his or her congregation, thus interfering substantially with the pastoral role of its ministers.

The comprehensive reporting requirement is designed to ensure the health and safety of children and fulfills a vital and appropriate secular purpose. In *Prince v. Massachusetts* (1944) 321 U.S. 158 [88 L.Ed. 645, 64 S.Ct. 438], the court stated, "The right to practice religion freely does not include liberty to expose the community or the child to communicable diseases or the latter to ill health or death." (*Id.*, at pp. 166- 167 [88 L.Ed. at pp. 650- 653].)

As respondent notes, religious freedom is not absolute. Religious organizations engage in various activities such as founding colonies and operating libraries, schools, wineries, hospitals, farms and industrial and other commercial *34 enterprises. Conceivably they may engage in any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such freedom, the direct consequences of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. (*Gospel Army v. City of Los Angeles* (1945) 27 Cal.2d 232 [163 P.2d 704].)

The act is limited in its intrusiveness and does not create an entanglement concern. The state has a legitimate interest in the health and safety of its children. The act mandates that certain persons, including teachers and administrators of private schools report known or suspected child abuse. The compelling state interest furthered by the act justifies the interference with appellants' religious practices when appellants are acting in the capacity of child care custodians within the meaning of the statute.

Thus, we find there was substantial evidence to support appellants' convictions. We also hold the statute, under the facts of this case, does not violate any of appellants' constitutional freedoms or rights.

For these reasons, the judgment of the lower court is hereby affirmed.

Tobin, J., and Murphy J., concurred. *35

Cal.Super.App., 1992.

People v. Hodges

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THE PEOPLE, Plaintiff and Respondent, v. BRYAN TONEY, Defendant and Appellant.
Cal.App.2.Dist.

THE PEOPLE, Plaintiff and Respondent,
v.
BRYAN TONEY, Defendant and Appellant.
No. B130777.

Court of Appeal, Second District, California.
Nov. 30, 1999.

SUMMARY

A jury convicted defendant of felony child abuse (Pen. Code, § 273a, subd. (a)) and multiple narcotics offenses, and the trial court sentenced him to state prison. A search of defendant's residence had revealed a narcotics laboratory. There was also a child's bedroom that looked like it was being lived in. Defendant was married to a woman who had a six-year-old son from a previous relationship. The child lived with his grandmother, but visited his mother and defendant on weekends. (Superior Court of Los Angeles County, No. MA017174, David S. Wesley, Judge.)

The Court of Appeal affirmed the judgment. The court held that substantial evidence supported defendant's felony child abuse conviction. Pen. Code, § 273a, subd. (a), prohibits a person from willfully exposing any child in his or her care or custody to danger likely to produce great bodily harm or death. In this case, the elements of the statute were met. First, the evidence was sufficient to demonstrate defendant's willingness to assume the care or custody of the child. Defendant had married the child's mother, who moved into his home. He also invited the child into his home, gave him a room of his own, and allowed him to use an area in the living room. Second, the evidence was sufficient to show that defendant willfully exposed the child to danger that was likely to produce great bodily harm or death. Defendant's home contained extremely dangerous, highly flammable chemicals in the living room, dining room, kitchen and garage. Many were on the floor. Any reasonable person would have understood the risks posed to a child in such a setting. (Opinion by Coffee, J., with Gilbert, P. J., and Yegan, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Infants § 16--Offenses Against Infants--Felony Child Abuse Statute--Evidence--Sufficiency. Substantial evidence supported defendant's felony child abuse conviction (Pen. Code, § 273a, subd. (a)). A search of defendant's residence had revealed a narcotics laboratory, and there was also a child's bedroom that looked like it was being lived in. Defendant was married to a woman who had a six-year-old son from a previous relationship. The child lived with his grandmother, but visited his mother and defendant on weekends. Pen. Code, § 273a, subd. (a), prohibits a person from willfully exposing any child in his or her care or custody to danger likely to produce great bodily harm or death. In this case, the elements of the statute were met. First, the evidence was sufficient to demonstrate defendant's willingness to assume the care or custody of the child. These terms do not imply a familial relationship, but only a willingness to assume duties correspondent to the role of a caregiver. Defendant had married the child's mother, who moved into his home. He also invited the child into his home, gave him a room of his own, and allowed him to use an area in the living room. Second, the evidence was sufficient to show that defendant willfully exposed the child to danger that was likely to produce great bodily harm or death. Defendant's home contained extremely dangerous, highly flammable chemicals in the living room, dining room, kitchen and garage. Many were on the floor. Any reasonable person would have understood the risks posed to a child in such a setting.

[See 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 840.]

(2) Infants § 16--Offenses Against Infants--Felony Child Abuse--Indirect Child Abuse--Required Mens Rea: Words, Phrases, and Maxims--Criminal Negligence.

Cases involving "indirect" child abuse require a showing of criminal negligence. This is defined as reckless, gross, or culpable departure from the ordinary standard of due care-conduct that is incompatible with a proper regard for human life.

(3) Infants § 16--Offenses Against Infants--Felony Child Abuse Statute-- Purpose.

Public policy supports the protection of children against risks that they cannot anticipate. The felony child abuse statute was enacted in order to protect the members of a vulnerable class from abusive situations in which serious injury or death is likely to occur.

COUNSEL

Joseph B. de Illy, under appointment by the Court of Appeal, for Defendant and Appellant. *620

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, and John R. Gorey, Deputy Attorney General, for Plaintiff and Respondent.

COFFEE, J.

Appellant challenges the sufficiency of the evidence supporting his felony child abuse conviction. We affirm.

Facts and Procedural History

Sheriff's Deputy Michael Thompson was on duty at 10:30 p.m. in East Lancaster. He saw appellant driving a white Toyota in front of him with expired tags. After running a check, he discovered its registration had been expired for over a year. Thompson made a lawful traffic stop in which appellant consented to a search that yielded a small quantity of marijuana. He was arrested.

A search of appellant's car revealed a cellophane wrapper in the ash tray which contained a small amount of methamphetamine (0.223 grams) and a Ziploc baggie on the driver's seat that yielded a small amount of cocaine base (0.0942 grams). Thirty-six boxes of pseudoephedrine cold medicine and three bottles of iodine tablets were found in the trunk.

A search of appellant's residence pursuant to a warrant revealed a "fume trap," in the living room: a five-gallon plastic bucket containing cat litter and tubing, designed to absorb deadly fumes released during the manufacture of methamphetamine.^{FN1} In the dining room was a cardboard box, which held a container of muriatic acid, plastic filters of isopropyl alcohol, isotone, rubber gloves, tubing and hydrogen peroxide. A second box contained various liquids, including solvents and a mixture of hydrochloric acid and red phosphorous. In the kitchen was a jug

containing a bilayered liquid that showed traces of methamphetamine and hydroxide. On the floor was a three-gallon pail of a caustic chemical that could melt the skin on contact.

FN1 Approximately three months before his arrest, appellant had purchased one pound of red phosphorous, which is used in the manufacture of methamphetamine. This is a two-stage process. Muriatic acid is combined with red phosphorous and iodine to make hydriatic acid for the initial reaction, which is then used to convert pseudoephedrine to methamphetamine.

In the garage were solvents, Coleman fuel, and a camp stove with white residue. There was also a fenced-off area in the backyard built up with trash. It was filled with empty containers of solvent, actifed and lye, as well as a discarded respirator. *621

To set up the kind of laboratory that appellant had at his house would take approximately five minutes. To cook and process the methamphetamine would take from eight to twelve hours.

In the living room were several tables with a child's paperwork. There was also a child's bedroom with toys and drawings that looked "lived in." Appellant was married to Judith W., who had a six-year-old son from a previous relationship, Morgan. Morgan lived with his grandmother, but visited Judith on weekends, and had been there the weekend prior to the search.

A jury convicted appellant of the following six counts: 1) possession of ephedrine with intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)); 2) possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); 3) possession of cocaine (Health & Saf. Code, § 11350, subd. (a)); 4) possession of marijuana while driving (Veh. Code, § 23222, subd. (b)); 5) manufacturing of methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)); and 6) felony child abuse (Pen. Code, § 273a, subd. (a).)^{FN2} The court sentenced appellant to five years in state prison.

FN2 All further statutory references are to the Penal Code unless otherwise indicated.

Discussion

Cal.App.2.Dist.

People v. Toney

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Stecks v. Young
Cal.App.4.Dist.

DAVID LLOYD STECKS et al., Plaintiffs and
Appellants,

v.

CANDACE YOUNG et al., Defendants and
Respondents.

No. D019564.

Court of Appeal, Fourth District, Division 1,
California.
Sep 18, 1995.

SUMMARY

In an action for libel per se, slander per se, and intentional infliction of emotional distress, brought by the parents of defendant psychologist's schizophrenic patient after defendant informed child protective services of her concerns that plaintiffs were committing child abuse, the trial court sustained defendant's demurrer without leave to amend and entered judgment for defendant. The court found that defendant, as a mandatory reporter under the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.), had absolute immunity (Pen. Code, § 11172, subd. (a)), from civil and criminal liability for reporting known or suspected abuse. During therapy, plaintiff's daughter had reported several incidents of child abuse to defendant, implicating plaintiffs and others. Defendant had reported the incidents based solely upon information provided by the daughter. (Superior Court of San Diego County, No. N57611, Thomas Ray Murphy, Judge.)

The Court of Appeal affirmed. The court held that the trial court did not err in determining that defendant was protected with absolute immunity, under Pen. Code, § 11172, subd. (a). As a mandatory reporter, under Pen. Code, § 11166, subd. (a), defendant was required to report any known or suspected abuse. The Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.), is a comprehensive scheme of reporting requirements aimed at increasing the likelihood that child abuse victims are identified. In accordance with the fundamental purpose of the act, to protect children, a mandatory reporter's entitlement to immunity does not depend upon a factual determination of whether he or she harbored a

reasonable suspicion of abuse at the time of reporting. Thus, defendant enjoyed absolute immunity regardless of whether her suspicion of abuse was reasonable. Moreover, even potentially irrelevant information about plaintiffs in defendant's report was immune. Finally, defendant did not lose her immunity even if she failed to submit her report within the statutory time frame. (Opinion by Haller, J., with Huffman, Acting P. J., and Nares, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 128--Scope of Review--Function of Appellate Court--Rulings on Demurrers. When an appeal arises from a dismissal following a demurrer, the reviewing court looks only to the plaintiff's complaint for relevant facts. The court accepts as true all properly pleaded allegations stated in the complaint and all facts appearing in exhibits attached to the complaint, giving such facts precedence over contrary allegations in the complaint.

(2) Infants § 16--Offenses Against Infants--Child Abuse and Neglect Reporting Act--Purpose of Act. The Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) is a comprehensive scheme of reporting requirements aimed at increasing the likelihood that child abuse victims are identified. These statutes, all of which reflect the state's compelling interest in preventing child abuse, are premised on the belief that reporting suspected abuse is fundamental to protecting children. The objective has been to identify victims, bring them to the attention of the authorities, and, where warranted, permit intervention. Committed to the belief that reporting requirements protect children, the Legislature consistently has increased, not decreased, reporting obligations and has afforded greater, not less, protection to mandated reporters whose reports turn out to be unfounded.

(3a, 3b) Infants § 16--Offenses Against Infants--Child Abuse and Neglect Reporting Act--Mandated Reporters--Failure to Report.

(Cite as: 38 Cal.App.4th 365)

Pen. Code, § 11166, subd. (a), which identifies mandated reporters, including health practitioners, and which defines the circumstances under which these individuals must report, affirmatively requires persons in positions where abuse is likely to be detected to report within specified time frames all suspected and known instances of child abuse to authorities for follow-up investigation. The failure to report can subject mandated reporters to both criminal prosecution and civil liability.

(4a, 4b, 4c) Infants § 16--Offenses Against Infants--Child Abuse Neglect Reporting Act--Psychologist's Absolute Immunity for Reporting Suspected Abuse.

In a libel action brought by the parents of defendant psychologist's patient after defendant informed child protective services of her concerns that plaintiffs were committing child abuse, the trial court did not err in sustaining defendant's demurrer, on the ground that defendant, as a mandatory reporter under the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.), had absolute immunity (Pen. Code, § 11172, subd. (a)). During therapy, plaintiff's daughter had reported several incidents of child abuse to defendant, implicating plaintiffs and others. Defendant reported the incidents based solely upon information provided by the daughter. Defendant's entitlement to immunity did not depend upon a factual determination of whether she harbored a reasonable suspicion of abuse when she made the report. Moreover, even potentially irrelevant information about plaintiffs in defendant's report was immune. Finally, defendant did not lose her immunity for failing to submit her report within the statutory time frame. If her report were treated as an "authorized" report (Pen. Code, § 11166, subd. (b)) as opposed to a "required" report (Pen. Code, § 11166, subd. (a)), the "authorized" report was not subject to a time requirement. Furthermore, given that immunity is a key ingredient in maintaining the act's integrity, the filing of an untimely report will not on its own destroy immunity.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 290.]

(5) Infants § 16--Offenses Against Infants--Child Abuse and Neglect Reporting Act--Purpose of Absolute Immunity Provision for Mandated Reporters.

The fundamental premise of the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) is that reporting abuse protects children. The Legislature included absolute immunity from civil and criminal liability for mandated reporters, since, otherwise, professionals would be reluctant to report if they faced liability for inaccurate reports, and it is

inconsistent to expose professionals to civil liability for failing to report and then expose them to liability where their reports prove false.

(6) Infants § 16--Offenses Against Infants--Child Abuse and Neglect Reporting Act--Absolute Immunity Provision for Mandated Reporters--Reasonable Suspicion of Abuse.

Under the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.), immunity for mandated reporters from civil and criminal liability attaches regardless of whether the reporter had a reasonable suspicion of child abuse. Otherwise, the immunity statute would be rendered virtually meaningless. There is no need for immunity when there can be no liability, as in the case of reports that are true or based upon objectively reasonable suspicion. The issue of the reasonableness of the reporter's suspicions would potentially exist in every reported case. The legislative scheme is designed to encourage the reporting of child abuse to the greatest extent possible to prevent further abuse. Reporters are required to report child abuse promptly and they are subject to criminal prosecution if they fail to report as required. Accordingly, absolute immunity from liability for all reports is consistent with that scheme.

(7) Infants § 16--Offenses Against Infants--Child Abuse and Neglect Reporting Act--Absolute Immunity Provision for Mandated Reporters--Required or Authorized Report.

The Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) confers absolute immunity upon a mandated reporter whether the reporter supplies a "required" report (Pen. Code, § 11166, subd. (a)) or an "authorized" one (Pen. Code, § 11167, subd. (b)). It would be anomalous to conclude that the reporter's required report of suspected child abuse is privileged, but that the legislatively contemplated subsequent communications concerning the incident would expose the reporter to potential civil liability. Such an interpretation would render nugatory the statutory language extending the privilege to authorized reports and would frustrate the legislative purpose by resurrecting the precise damper on full reporting and cooperation that the legislative scheme was designed to eliminate. Thus, it is of no consequence whether a report is treated as required or authorized.

(8) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.

The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. Moreover,

every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.

COUNSEL

Gore, Grosse, Greenman & Lacy and Michael L. Klein for Plaintiffs and Appellants.
Lewis, D'Amato, Brisbois & Bisgaard, Jeffrey B. Barton, Joan M. Danielsen and James E. Friedhofer for Defendants and Respondents.

HALLER, J.

David and Nancy Stecks brought an action for libel per se, slander per se, and intentional infliction of emotional distress against psychologist Candace Young. The action concerned an oral and a written report *369 Young made to the child protective services regarding the Steckses and others in which she accused these individuals of child abuse and participation in cult activities. The reports were based upon information Young received from her patient, the Steckses' allegedly schizophrenic adult daughter.

Young demurred, contending she was entitled to absolute immunity pursuant to Penal Code ^{FN1} section 11172, subdivision (a). The trial court agreed and sustained the demurrer with leave to amend. After the Steckses filed a first amended complaint, Young filed a second demurrer, again asserting absolute immunity. The court sustained the demurrer without leave to amend and then entered judgment in Young's favor.

FN1 All statutory references are to the Penal Code.

On appeal, the Steckses maintain the immunity is inapplicable because (1) Young did not harbor a reasonable suspicion of abuse when she submitted the reports, (2) Young reported issues irrelevant to the prevention of child abuse, and (3) Young conveyed her reports in an untimely manner. Following the thoughtful and well-reasoned reported decisions that previously have interpreted the broadly written Child Abuse and Neglect Reporting Act (§ 11164 et seq.), we affirm the judgment. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450 [20 Cal.Rptr. 321, 369 P.2d 937].)

Facts

(1) Because this appeal arises from a dismissal following a demurrer, we look only to the Steckses'

first amended complaint for relevant facts. We accept as true all properly pleaded allegations stated in the complaint. (Phillips v. Desert Hospital Dist. (1989) 49 Cal.3d 699, 702 [263 Cal.Rptr. 119, 780 P.2d 349].) We also accept as true all facts appearing in exhibits attached to the complaint and give such facts precedence over contrary allegations in the complaint. (Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal.App.3d 1624, 1627 [272 Cal.Rptr. 623].) ^{FN2}

FN2 The Steckses attached the October 16, 1991, letter, which forms the gravamen of their allegations, as an exhibit to the first amended complaint and incorporated it by reference.

Young is a licensed marriage, family, and child counselor with a doctorate in clinical psychology. She is a member of the Ritual Abuse Task Force for the San Diego County Commission on Children and Youth. In September 1988, she began treating the Steckses' 29-year-old daughter (hereafter patient), who had been diagnosed as schizophrenic and suffering from multiple personality disorder. While in psychotherapy sessions, patient reported that her mother and father had sexually molested her when she was a child, *370 practiced satanic worship, abused alcohol and marijuana, and participated in human and animal sacrifice and brainwashing.

During treatment, patient also told Young she was concerned about the welfare and safety of her niece and nephew, particularly her niece, whom she thought might be a victim of sexual molestation by patient's brother-in-law. In April 1990, patient, but not Young, informed child protective services of her concerns. In September 1991, patient informed Young that she had information suggesting her nephew was scheduled to be sacrificed at a cult ritual celebration of the fall equinox. Patient again implicated the children's father in the planned cult ritual.

After patient told Young of the anticipated ritualistic sacrifice, Young spoke directly with Wells Gardner of child protective services. On October 16, 1991, Young, at Gardner's request, sent a letter to Gardner in which she conveyed her concerns regarding the children and why she thought patient should be believed. Before sending the letter, Young had never met or communicated with the Steckses, the children, or the children's parents, relying instead solely upon information patient provided. The letter was seen and

(Cite as: 38 Cal.App.4th 365)

read by Gardner, others associated with child protective services, medical practitioners and individuals within the criminal justice system.

The letter, which according to the Steckses does not "suggest" they posed any danger to their grandchildren, included serious accusations about the Steckses' relationship with patient when she was a child, their involvement in cult activities, and Young's assessment that neither of the Steckses would be a proper caretaker for their grandchildren. The Steckses contend the letter and all oral representations concerning them were false and that Young made these statements with "a complete absence of reasonable suspicion" they were true. Further, they allege Young's actions have harmed their good reputations and caused them damages, including mental and physical distress.^{FN3}

FN3 From the record, it is clear that child protective services conducted some level of investigation concerning the Steckses' grandchildren, but the record is silent as to what form the investigation took. Although the parties do not reference the filing of a dependency petition or any criminal proceedings, the Steckses did inform the trial court at oral argument on January 22, 1993, that "these two children ... have long since been returned to their parents."

Discussion

For more than 30 years, California has used mandatory reporting obligations as a way to identify and protect child abuse victims. In 1963, the Legislature passed former section 11161.5, its first attempt at imposing upon *371 physicians and surgeons the obligation to report suspected child abuse. Although this initial version and later ones carried the risk of criminal sanctions for noncompliance, the state Department of Justice estimated in November 1978 that only about 10 percent of all cases of child abuse were being reported. (*Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1216-1217 [242 Cal.Rptr. 312].)

(2) Faced with this reality and a growing population of abused children, in 1980 the Legislature enacted the Child Abuse Reporting Law (§ 11165 et seq.), a comprehensive scheme of reporting requirements "aimed at increasing the likelihood that child abuse victims are identified." (*James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 254 [21 Cal.Rptr.2d

169], citing *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 90 [270 Cal.Rptr. 379].) The Legislature subsequently renamed the law the Child Abuse and Neglect Reporting Act (Act) (§ 11164). (Stats. 1987, ch. 1444, § 1.5, p. 5369.)

These statutes, all of which reflect the state's compelling interest in preventing child abuse, are premised on the belief that reporting suspected abuse is fundamental to protecting children. The objective has been to identify victims, bring them to the attention of the authorities, and, where warranted, permit intervention. (*James W. v. Superior Court, supra*, 17 Cal.App.4th at pp. 253-254.) Committed to the belief that reporting requirements protect children, the Legislature consistently has increased, not decreased, reporting obligations and has afforded greater, not less, protection to mandated reporters whose reports turn out to be unfounded.

Against this background, we examine the relevant provisions of the Act.

(3a) Section 11166, subdivision (a) identifies mandated reporters, including health practitioners,^{FN4} and defines the circumstances under which these individuals must report. This provision affirmatively "requires persons in positions where abuse is likely to be detected to report promptly all suspected and known instances of child abuse to authorities for follow-up investigation." (*Ferraro v. Chadwick, supra*, 221 Cal.App.3d at p. 90.) Suspected abuse includes circumstances where "it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse." (§ 11166, subd. (a).) The incident must be reported "as soon as practically possible by telephone," followed by a written report "within 36 hours of receiving the information" (*Ibid.*) Failure to comply is punishable as a misdemeanor. (§ 11172, subd. (e).) *372

FN4 Young, a licensed marriage, family, and child counselor, is a health practitioner within the meaning of section 11165.8.

Section 11167, subdivision (b) authorizes communications with child abuse protective agencies and provides that "[i]nformation relevant to the incident of child abuse may also be given to an investigator from a child protective agency who is investigating the known or suspected case of child

abuse.”

Section 11172, subdivision (a) establishes immunity. It “cloaks mandated reporters with immunity from civil and criminal liability for making any report ‘required or authorized’ by the Act.” (*Ferraro v. Chadwick*, *supra*, 221 Cal.App.3d at pp. 90-91.)^{FN5} Subdivision (c) of section 11172 entitles mandated reporters who incur legal fees defending a legal action brought despite the immunity, to recover their legal fees from the state Board of Control.

FN5 This statute also affords immunity to nonmandated reporters who report known or suspected child abuse, “unless it can be proven that a false report was made and the [nonmandated reporter] knew that the report was false or was made with reckless disregard of the truth or falsity of the report....” (§ 11172, subd. (a).)

(4a) The Steckses contend that Young's entitlement to immunity depends upon a factual determination of whether she harbored a reasonable suspicion of abuse when she reported to child protective services. While the Steckses concede that as a health practitioner Young must comply with the Act's mandatory reporting provisions, they argue her immunity is not absolute. From their perspective, they have the right to prove up the accusations contained in the first amended complaint because the Act does not protect Young from preparing negligent or knowingly false reports.

(5) As respondent argues convincingly, however, the Steckses' position is contrary to existing precedent and is inconsistent with the Act's fundamental premise-reporting protects children. It also disregards those factors which eventually led the Legislature to include absolute immunity within the Act: (1) professionals will be reluctant to report if they face liability for inaccurate reports, and (2) it is inconsistent to expose professionals to civil liability for failing to report^{FN6} and then expose them to liability where their reports prove false. As the Legislature recognized, accurate reports of abuse do not lead to civil lawsuits. Only those which cannot be confirmed, are unfounded, or, worse yet, are intentionally false, do. Faced with a choice between absolute immunity, which would promote reporting but preclude redress to those harmed by false accusations, and conditional immunity, which would limit reporting but allow redress, the Legislature, through various amendments, ultimately selected

absolute immunity. (*Storch v. Silverman* (1986) 186 Cal.App.3d 671, 679-681 [231 Cal.Rptr. 27].)*373

FN6 See *Landeros v. Flood* (1976) 17 Cal.3d 399 [131 Cal.Rptr. 69, 551 P.2d 389, 97 A.L.R.3d 324].

(6) The appellate courts of this state, including our own court, have previously evaluated the Act's immunity provision and, in each case, soundly rejected the argument that immunity does not attach unless “reasonable suspicion” existed. As succinctly stated by the Court of Appeal in *Storch*, which conducted a comprehensive analysis of (1) the statutory language, (2) the legislative purposes, and (3) the historical background of the statutory immunities:

“Plaintiffs' interpretation, however, renders the immunity statute virtually meaningless. There is no need for immunity when there can be no liability, as in the case of reports that are true or based upon objectively reasonable suspicion.... The issue of the reasonableness of the reporter's suspicions would potentially exist in every reported case.

“The legislative scheme is designed to encourage the reporting of child abuse to the greatest extent possible to prevent further abuse. Reporters are required to report child abuse promptly and they are subject to criminal prosecution if they fail to report as required. Accordingly, absolute immunity from liability for all reports is consistent with that scheme.” (*Storch v. Silverman*, *supra*, 186 Cal.App.3d at pp. 678-679, fn. omitted; accord, *Krikorian v. Barry*, *supra*, 196 Cal.App.3d at p. 1223; *Thomas v. Chadwick* (1990) 224 Cal.App.3d 813, 819-820 [274 Cal.Rptr. 128]; *Ferraro v. Chadwick*, *supra*, 221 Cal.App.3d at pp. 90-92; see also *James W. v. Superior Court*, *supra*, 17 Cal.App.4th 246 [where we declined to apply immunity to the post reporting activities of a psychologist and foster parents, and reaffirmed that mandated reporters are entitled to absolute immunity even if their reports are negligently prepared or intentionally false].)

The Steckses insist cases such as *Storch*, *Krikorian*, *Ferraro* and *Thomas* were wrongly decided. We disagree and decline to forge a course inconsistent with the thoughtful reasoning and holdings of these cases.^{FN7}

FN7 To the extent the Steckses contend James W. v. Superior Court, supra, 17 Cal.App.4th 246 casts doubt on the validity of the absolute immunity rule, they read the case too broadly. James W. involved activities that were neither required nor authorized under the Act. Our court found only that section 11172 "... does not apply to activities that continue more than two years after the initial report of abuse by parties who are not acting as reporters." (17 Cal.App.4th at p. 253.)

(7) In following precedent, we are also mindful that the Act confers absolute immunity upon a mandated reporter whether the reporter supplies a "required" report (§ 11166, subd. (a)) or an "authorized" one (e.g., § 11167, subd. (b)). (Ferraro v. Chadwick, supra, 221 Cal.App.3d at p. 94.) As we observed in Thomas v. Chadwick, supra, 224 Cal.App.3d at p. 822: "It would be anomalous to conclude that the reporter's 'required' report of suspected child abuse is privileged, but that the legislatively contemplated subsequent *374 communications concerning the incident would expose the reporter to potential civil liability. Such an interpretation would render nugatory the statutory language extending the privilege to 'authorized reports,' and would frustrate the legislative purpose by resurrecting the precise damper on full reporting and cooperation which the legislative scheme was designed to eliminate." Thus, it is of no consequence whether we treat Young's oral communication and written report as "required" or "authorized."

(4b) In a related argument, the Steckses contend immunity is inapplicable because Young's statements about them were irrelevant to the prevention of child abuse. Relying on the portion of their first amended complaint that alleges, "[t]he letter does not suggest that the [grandchildren] were in any danger from their grandparents," the Steckses argue the information concerning them in Young's letter is beyond the scope of immunized conduct.

Preliminarily, we note other contrary allegations belie the Steckses' argument. The October 16, 1991, letter, which appellants attach as an exhibit and incorporate by reference, states, "[t]his letter is in response to your request to provide further information regarding my concerns for the [grandchildren] ... [and why] I would have grave concerns about the children being placed with either the maternal or paternal grandparents."

Moreover, regardless of whether the information about them in Young's letter was relevant, the Steckses' position that the Act does not immunize irrelevant information undermines, rather than supports, the Act's key premise—namely that reporting protects children. Inevitably, were we to accept their position, we would simply invite protracted litigation concerning a factual determination of which statements were or were not "relevant." Because such an approach would discourage reporting, it is inconsistent with the legislative scheme and the Act's objectives.

Finally, the Steckses maintain that even if Young's reporting activities are protected, Young lost her immunity because her written report was not submitted "within 36 hours of receiving the information concerning the incident." ^{FN8}(§ 11166, subd. (a).) (3b) As noted, section 11166 subdivision (a) creates an affirmative obligation upon designated professionals to report known and suspected child abuse and to do so within specified time frames. The failure to report can subject mandated reporters to both criminal prosecution (§ 11172 subd. (e)) and civil liability. (Landeros v. Flood, supra, 17 Cal.3d 399.) *375

FN8 The Steckses do not allege the date on which Young orally reported to child protective services or how much time transpired between Young receiving the information from patient and talking with Wells Gardner. Likewise, they do not argue that the initial report was untimely.

By contrast, once the report is made, immunity attaches. (§ 11172 subd. (a).) To suggest, as the Steckses do, that untimely reports are not protected, is inconsistent with the language of the statute and legislative objectives. (8) "The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] Moreover, 'every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.]" (Select Base Materials v. Board of Equal. (1959) 51 Cal.2d 640, 645 [335 P.2d 672].) If we were to adopt the Steckses' position, tardy mandated reporters with pertinent information would be reluctant to report out of fear that their actions might lead to litigation—a result at variance with the purposes of the Act. (Ferraro v. Chadwick, supra, 221 Cal.App.3d at p. 94.)

(4c) The Steckses' untimeliness argument is similarly unavailing if the October 16, 1991, letter is treated as an "authorized" report (§ 11166, subd. (b)) as opposed to a "required" report (§ 11166, subd. (a)). Unlike "required" reports, "authorized" reports do not reference a time requirement.^{FN9}

FN9 The appellants' reliance on *Searcy v. Auerback* (9th Cir. 1992) 980 F.2d 609, where a federal appeals court, applying California law, concluded that a clinical psychologist was not entitled to immunity because he failed to comply with conditions specified in the Act, is misplaced. There, unlike here, the report in question was prepared at the request of and given to a father who suspected his child was the victim of sexual molest. The father gave the report to the police, who used it to initiate an investigation against the child's mother.

Without exception, our appellate courts have concluded that immunity is a key ingredient in maintaining the Act's integrity and thus have rejected efforts aimed at narrowing its protection. While we recognize that unfounded reports can lead to serious, sometimes devastating consequences, and we have great sympathy for those who are wrongfully accused, as we noted in *Thomas v. Chadwick, supra*, "[i]n this war on child abuse the Legislature selected absolute immunity as part of its arsenal. This value choice is clearly within the province of the Legislature. We cannot defuse this chosen weapon on the ground that its effect is sometimes ill when its general purpose is good." (*Thomas v. Chadwick, supra*, 224 Cal.App.3d at p. 827.)

Having reaffirmed prior holdings affording absolute immunity to those individuals the Act designates as mandated reporters, we express our concern that factually this case presses the outer limits of immunity. Typically, mandated reporters base their reports upon personal interviews with or observations of the alleged victim or abuser or upon information derived from other professionals treating or investigating the alleged abuse. By contrast, here the mandated reporter allegedly trusted the accusations of a purportedly schizophrenic patient, who had no personal knowledge that *376 the children were being abused, and conveyed those accusations to the authorities.

In circumstances where the mandated reporter is not

drawing upon personal professional assessments of the victim or abuser or is not relying upon other trained professionals who have made such assessments, we submit that the application of absolute immunity warrants further reflection by the Legislature. Where such reports turn out to be false, the Legislature may deem it appropriate to apply qualified immunity and to permit recovery where the wrongfully accused person can establish that the report was known to be false or made in reckless disregard of the truth. However, absent a change in the statute, the trial court properly sustained the demurrer without leave to amend.

Disposition

Affirmed.

Huffman, Acting P. J., and Nares, J., concurred.
Appellants' petition for review by the Supreme Court was denied December 14, 1995. *377

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Williams v. Garcetti
 Cal. 1993.

GARY WILLIAMS et al., Plaintiffs and Appellants,
 v.
 GILBERT GARCETTI, as District Attorney, etc., et
 al., Defendants and Respondents.
 No. S024925.

Supreme Court of California
 Jul 1, 1993.

SUMMARY

Plaintiff taxpayers filed a complaint for injunctive and declaratory relief against the county district attorney and the city attorney, seeking to halt the enforcement of an amendment to Pen. Code, § 272 (contributing to dependency or delinquency of minor), which imposes upon parents the duty to "exercise reasonable care, supervision, protection, and control over their minor children." Plaintiffs alleged that enforcement would constitute a waste of public funds inasmuch as the amendment was unconstitutionally vague and overbroad on its face and impinged on the right to privacy. On cross-motions for summary judgment, the trial court granted summary judgment in favor of defendants. (Superior Court of Los Angeles County, No. C731376, Ronald M. Sohigian, Judge.) The Court of Appeal, Second Dist., Div. One, No. B056250, reversed, determining that the amendment was unconstitutionally vague.

The Supreme Court reversed the judgment of the Court of Appeal with directions to affirm the judgment of the trial court. The court held that the amendment is not unconstitutionally vague, since it provides adequate notice to parents with regard to potential criminal liability for failure to supervise and control their children, and provides adequate standards for its enforcement and adjudication in order to avoid the danger of arbitrary and discriminatory enforcement. The court also held that the amendment is not unconstitutionally overbroad. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Constitutional Law § 113--Due Process--Substantive Due Process--Statutory Vagueness.

The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of life, liberty, or property without due process of law, as assured by both the federal Constitution (U.S. Const., 5th and 14th Amends.) and the California Constitution (Cal. Const., art. I, § 7). Under both Constitutions, due process of law in this context requires two elements. A criminal statute must be definite enough to provide (1) a standard of conduct for those whose activities are proscribed, and (2) a standard for police enforcement and for ascertainment of guilt. Indeed, the requirement of guidelines for law enforcement is the more important aspect of the vagueness doctrine. The reason for its importance is that where the Legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows police officers, prosecutors, and juries to pursue their personal predilections.

[See 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 43 et seq.]

(2) Constitutional Law § 113--Due Process--Substantive Due Process--Statutory Vagueness--Standard of Review.

Courts evaluate the specificity of a statute according to the following standards; Vague laws offend several important values. First, because it is assumed that a person is free to steer between lawful and unlawful conduct, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police officers, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. The starting point of the court's analysis is the strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. A statute should be sufficiently certain so that a person may

know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.

(3a, 3b, 3c, 3d, 3e, 3f, 3g) Parent and Child § 14--Custody and Control--Criminal Liability for Failure to Supervise and Control Minor Child--Validity of Statute--Vagueness:Delinquent, Dependent, and Neglected Children § 38--Contributing to Delinquency.

An amendment to Pen. Code, § 272, which imposes upon parents the duty to "exercise reasonable care, supervision, protection, and control over their minor children," is not unconstitutionally vague. The amendment incorporates the definitions and limits of parental duties that have long been a part of California dependency law and tort law. The terms "supervision" and "control" suggest an aspect of the parental duty that focuses on the child's actions and their effect on third persons. Implicit in the statute's original language was the duty to prevent the child from engaging in certain delinquent acts. The amendment provides more explicitly that parents violate § 272 when their failure to reasonably supervise and control results in the child's delinquency. Thus, the amendment provides adequate notice with regard to potential criminal liability for failure to supervise and control their children because (1) it incorporates well-established tort law, and (2) it imposes criminal liability only when the parent engages in conduct that so grossly departs from the standard of care as to amount to criminal negligence. Further, the incorporation of preexisting tort concepts and the requirement of a causative link between a parent's criminal negligence and the child's delinquency provide standards for enforcement and adjudication of the amendment thereby minimizing the danger of arbitrary and discriminatory enforcement.

[See Cal.Jur.3d (Rev), Criminal Law, § 967; 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 836.]

(4) Statutes § 13--Amendment--Purpose--Change in law or Clarification.

Where changes have been introduced to a statute by amendment, it must be assumed the changes have a purpose. That purpose is not necessarily to change the law. While an intention to change the law is usually inferred from a material change in the language of the statute, a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute.

(5) Statutes § 21--Construction--Legislative Intent--Motive of Individual Legislator.

In construing a statute, a court does not consider the motives or understandings of an individual legislator even if he or she authored the statute.

(6) Parent and Child § 14--Custody and Control--Duty to Prevent Minor Child From Harming Others.

California law finds a special relationship between parent and child, and accordingly places upon a parent a duty to exercise reasonable care to control his or her minor child so as to prevent it from intentionally harming others or conducting itself in a way that creates an unreasonable risk of bodily harm to others, if the parent (a) knows or has reason to know that he or she has the ability to control the child, and (b) knows or should know of the necessity and opportunity for exercising such control.

(7) Statutes § 45--Construction--Presumptions--Legislature's Knowledge of Existing State of Law.

When construing a statute, a court assumes that, in passing the statute, the Legislature acted with full knowledge of the state of the law at the time.

(8) Constitutional Law § 113--Due Process--Substantive Due Process--Statutory Vagueness--Difficulty in Determining Statute's Applicability to Marginal Offense.

Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

(9) Criminal Law § 8--Mental State--Criminal Negligence.

In the criminal context, ordinary negligence sufficient for recovery in a civil action will not suffice; to constitute a criminal act the defendant's conduct must go beyond that required for civil liability and must amount to a gross or culpable departure from the required standard of care.

(10a, 10b) Constitutional Law § 113--Due Process--Substantive Due Process--Statutory Overbreadth.

A challenge that a statute is overbroad implicates the constitutional interest in due process of law (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 7, subd. (a), 24.). The overbreadth doctrine provides that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. However, a facial overbreadth

challenge is difficult to sustain. Application of the overbreadth doctrine is employed sparingly and only as a last resort. Consequently, to justify a conclusion of facial overbreadth, the overbreadth of a statute must not only be real, but must be substantial as well.

(11a, 11b) Parent and Child § 14--Custody and Control--Criminal Liability for Failure to Supervise and Control Minor Child--Validity of Statute--Overbreadth:Delinquent, Dependent, and Neglected Children § 38-- Contributing to Delinquency.

An amendment to Pen. Code, § 272 (contributing to dependency or delinquency of minor), which imposes upon parents the duty to "exercise reasonable care, supervision, protection, and control over their minor children," is not unconstitutionally overbroad on its face. Although parties challenging the amendment asserted that it infringed on the right of intimate family association protected by both the federal and state Constitutions, the assertions lacked the particularity necessary to find a statute overbroad. Moreover, the amendment is not standardless; it incorporates the definition and limits of the parental tort duty of supervision and control. That definition and those limits guard against any excessive sweep by the criminal prohibition. Since the challengers did not show that a substantial number of instances exist in which the amendment cannot be applied constitutionally, the amendment could not be considered substantially overbroad, and whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations involved.

(12) Constitutional Law § 113--Due Process--Substantive Due Process-- Statutory Overbreadth--Rights Protected.

The concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government extends to basic liberties and rights not explicitly listed in the Constitution, such as the right to marry, establish a home and bring up children; the right to educate one's children as one chooses; and the right to privacy and to be let alone by the government in the private realm of family life.

COUNSEL

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James K. Hahn, City Attorney, Maureen Siegel, Assistant City Attorney, Debbie Lew and R. Bruce Coplen, Deputy City Attorneys, Ira Reiner and Gilbert I. Garcetti, District Attorneys, Thomas P. Higgins, Deputy District Attorney, Chase, Rotchford,

Drukker & Bogust, Ronald A. Dwyer, John A. Daly and David F. Link for Defendants and Respondents.

MOSK, J.

Penal Code section 272 (hereafter section 272) provides that every person who commits any act or omits any duty causing, encouraging, or contributing to the dependency or delinquency of a minor is guilty of a misdemeanor. A 1988 amendment thereto (hereafter the amendment) provides that for the purposes of this section, parents or guardians "shall have the duty to exercise reasonable care, supervision, protection, and control" over their children. We granted review in this case to determine whether on *566 its face the amendment is so vague or overbroad as to violate constitutional due process requirements. As will appear, we conclude that the amendment withstands challenge on the grounds of both vagueness and overbreadth, and we therefore reverse the judgment of the Court of Appeal.

I. Facts and Procedural History

For decades there has been some form of statutory prohibition against the conduct known as "contributing to the delinquency of a minor." ^{FN1}Section 272 is the most recent of these provisions, although its "contributing to delinquency" title is incomplete because it explicitly applies not only to delinquency (see Welf. & Inst. Code, § § 601 [habitually disobedient or truant minors], 602 [minors who commit crimes]) but also to dependency (see *id.*, § 300 [minors within the jurisdiction of juvenile courts by reason of physical, emotional, or sexual abuse, or neglect, among other factors]).

FN1 See, e.g., Statutes 1909, chapter 133, section 26, page 225; Statutes 1915, chapter 631, section 21, page 1246; Statutes 1937, chapter 369, section 702, page 1033; Statutes 1961, chapter 1616, section 3, page 3503.

Between 1979 and 1988 section 272 provided, in relevant part: "Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Sections 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto ... is guilty of a misdemeanor" In 1988 the Legislature appended a sentence to section 272: "For purposes of this section, a parent or legal guardian to any person under the age

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of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.” (Stats. 1988, ch. 1256, § 2, p. 4182.) This amendment is the object of the present lawsuit.

As part of the bill that included the amendment, the Legislature established a parental diversion program. (Pen. Code, § 1001.70 et seq.) Under specified circumstances the probation department may recommend the diversion of parents or guardians (hereafter collectively referred to as parents) charged under section 272 to an education, treatment, or rehabilitation program prior to trial. Satisfactory completion of the program results in dismissal of the criminal charges.

Plaintiffs, as taxpayers, filed a complaint for injunctive and declaratory relief to halt the enforcement of the amendment, claiming it would constitute a waste of public funds. (Code Civ. Proc., § 526a.) They named as defendants Ira Reiner, as Los Angeles County District Attorney, and James K. *567 Hahn, as Los Angeles City Attorney. (Gilbert Garcetti has since succeeded Reiner as district attorney.) The grounds of the complaint were that the amendment was unconstitutionally vague, overbroad, and an impingement on the right to privacy.

Both sides moved for summary judgment. The trial court granted summary judgment for defendants, concluding that the amendment was neither vague nor overbroad and that plaintiffs lacked standing to challenge it in any case.

Plaintiffs appealed. Reversing the judgment, the Court of Appeal first held that the trial court erred on the question of standing and that plaintiffs had standing as taxpayers.^{FN2} On the merits, the court struck down the amendment as unconstitutionally vague, expressly declining to reach the question of its overbreadth.^{FN3}

FN2 Defendants did not challenge plaintiffs' standing on appeal, nor do they do so before this court.

FN3 The trial court did not rule on the privacy claim, and plaintiffs did not raise the point on appeal.

II. Vagueness

(1a) The constitutional interest implicated in questions of statutory vagueness is that no person be

deprived of “life, liberty, or property without due process of law,” as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7). Under both Constitutions, due process of law in this context requires two elements: a criminal statute must “be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.” (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 141 [253 Cal.Rptr. 1, 763 P.2d 852]; see also *Kolender v. Lawson* (1983) 461 U.S. 352, 357 [75 L.Ed.2d 903, 908-909, 103 S.Ct. 1855].)

(2) We evaluate the specificity of the amendment according to the following standards: “Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and *568 juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763 [221 Cal.Rptr. 779, 710 P.2d 845], quoting *Gravned v. City of Rockford* (1972) 408 U.S. 104, 108-109 [33 L.Ed.2d 222, 227-228, 92 S.Ct. 2294], fns. omitted.)

The starting point of our analysis is “the strong presumption that legislative enactments ‘must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.’” (*Walker v. Superior Court, supra*, 47 Cal.3d at p. 143.)

A. Notice

(3a) According to the foregoing principles, the amendment is not sufficiently specific unless a parent of ordinary intelligence would understand the nature of the duty of “reasonable care, supervision, protection, and control” referred to therein, as well as

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what constitutes its omission. Plaintiffs contend the amendment changed the law by creating a new-and impermissibly vague-parental duty as a basis for criminal liability. Defendants reply that the amendment did not change the law; rather, it merely clarified the statute's application to an existing parental duty.^{FN4}

FN4 In either case it is clear that parents have always been liable for contributing to the delinquency of a minor under section 272 and its predecessors. Originally the statute provided for liability of "the parent or parents, legal guardian or person having the custody of such child, or any other person" (Stats. 1909, ch. 133, § 26, p. 225; cf. *In re Sing* (1910) 14 Cal.App. 512, 514 [112 P. 582] ["any other person" not limited to person standing in loco parentis to minor].) This was later amended simply to "[a]ny person" (Stats. 1913, ch. 673, § 28, p. 1303) and is now "[e]very person" (§ 272).

(4) "Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose" (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337 [283 Cal.Rptr. 893, 813 P.2d 240].) That purpose is not necessarily to change the law. "While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute." (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71].)

(3b) In support of their contention that the purpose of the amendment was to clarify existing law and facilitate prosecution of parents under *569section 272, defendants offer a declaration to this effect by the legislative assistant to the principal author of the legislation that included the amendment. This declaration is not dispositive of the amendment's purpose. (5) In construing a statute "we do not consider the motives or understandings of an individual legislator even if he or she authored the statute." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 801, fn. 12 [268 Cal.Rptr. 753, 789 P.2d 934]; accord, *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590 [128 Cal.Rptr. 427, 546 P.2d 1371].)

(3c) We therefore turn to the statutory context as a sign of legislative purpose. The Legislature enacted the amendment and the related parental diversion program as part of the Street Terrorism Enforcement and Prevention Act, the premise of which was that "the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (Stats. 1988, ch. 1256, § 1, p. 4179.) The act included measures establishing criminal penalties for gang participation and allowing sentence enhancements for gang-related conduct; defining certain buildings in which gang activities take place as nuisances subject to injunction, abatement, or damages; and prohibiting terrorist threats of death or great bodily injury.

Viewed in the context of the act, i.e., as part of its broad scheme to alleviate the problems caused by street gangs, the amendment to section 272 and the parental diversion program appear intended to enlist parents as active participants in the effort to eradicate such gangs.^{FN5} Because the legislative history of the amendment is sparse, confined largely to the declaration *570 described above, we cannot rule out either plaintiffs' interpretation that the Legislature intended to enlarge the scope of parents' criminal liability or defendants' view that the Legislature merely clarified its scope. But it is not necessary for us to decide this question, for in either case our inquiry is the same: whether a parental duty of "reasonable care, supervision, protection, and control" is sufficiently certain to meet constitutional due process requirements. We conclude that it is because it incorporates the definitions and the limits of parental duties that have long been a part of California dependency law and tort law.

FN5 Our Legislature is not unique in addressing the problem of juvenile delinquency by making a parent criminally liable when the parent's failure to supervise or control a child results in the child's delinquency. "Holding parents responsible for juvenile delinquency is not a new concept. Colorado enacted the first law holding parents criminally liable for their children's delinquent acts in 1903." (Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children* (1991) 44 *Vand.L.Rev.* 441, 446.) At present, a New York statute provides: "A person is guilty of

endangering the welfare of a child when: ... [¶] [b]eing a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision'" (N.Y. Penal Law, § 260.10, subd. (2) (Lawyers Coop. 1993); see People v. Scully (1987) 134 Misc.2d 906 [513 N.Y.S.2d 625, 627] [statute not void for vagueness as applied]; People v. Bergerson (1966) 17 N.Y.2d 398 [271 N.Y.S.2d 236, 239-240, 218 N.E.2d 288] [predecessor statute not void for vagueness].) A similar Kentucky statute provides: "A parent, guardian or other person legally charged with the care or custody of a minor is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child." (Ky. Rev. Stat. Ann., § 530.060, subd. (1) (Michie 1992).)

Plaintiffs do not dispute that parents' legal responsibilities in regard to the "care" and "protection" of their children—focusing on forces external to the child that affect the child's own welfare—are well established and defined. For example, Welfare and Institutions Code section 300 contains a lengthy list of conditions under which a minor can be removed from the custody of a parent and declared a dependent child of the court.^{FN6} We agree with the Court of Appeal that section 300 provides guidelines sufficiently specific to delineate the circumstances under which a child will qualify for dependent status and thus to define the parental duty of care and protection that would prevent the occurrence of those circumstances.

FN6 These conditions include: "(a) The minor has suffered ... serious physical harm inflicted nonaccidentally upon the minor by the minor's parent or guardian. ... [¶] (b) The minor has suffered ... serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the minor [¶] (c) The minor is suffering serious emotional damage ... as a result of the

conduct of the parent or guardian [¶] (d) The minor has been sexually abused ... by his or her parent or guardian or a member of his or her household [¶] (e) The minor is under the age of five and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the minor. ... [¶] ... [¶] (g) The minor has been left without any provision for support [¶] ... [¶] (i) The minor has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household"

Accordingly, we confine the balance of our analysis to section 272 as applied to juvenile delinquency through Welfare and Institutions Code sections 601 and 602, and to the "supervision" and "control" elements of the duty identified in the amendment.

The terms "supervision" and "control" suggest an aspect of the parental duty that focuses on the child's actions and their effect on third parties. This aspect becomes plain when the amendment is read in conjunction with Welfare and Institutions Code sections 601 and 602. Section 601, subdivision (a), brings within the jurisdiction of the juvenile court any minor who, inter alia, "violated any ordinance of any city or county of this state establishing a curfew" Subdivision (b) of section 601 brings within *571 the jurisdiction of the juvenile court minors for whom "the available public and private services are insufficient or inappropriate to correct the habitual truancy of the minor, or to correct the minor's persistent or habitual refusal to obey the reasonable and proper orders or directions of school authorities" Section 602 brings within the jurisdiction of the juvenile court any minor who "violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime"

According to its preamendment language, section 272 thus imposes misdemeanor liability on any person whose act or omission causes or encourages a child to violate a curfew, be habitually truant, or commit a crime—i.e., to engage in delinquent acts. Implicit in this language is the duty to make a reasonable effort to prevent the child from so doing; the breach of that duty violates section 272 only when the person "causes or tends to cause or encourage" the child's delinquency. The amendment here at issue provides more explicitly that *parents* violate section 272 when they omit to perform their duty of reasonable

“supervision” and “control” and that omission results in the child's delinquency. Therefore, the Legislature must have intended the “supervision” and “control” elements of the amendment to describe parents' duty to reasonably supervise and control their children so that the children do not engage in delinquent acts.

Parents have long had a duty to supervise and control ^{FN7} their children under California tort law. (See, e.g., *572 *Singer v. Marx* (1956) 144 Cal.App.2d 637, 644 [301 P.2d 440] [“[T]he parent has a special power of control over the conduct of the child, which he is under a duty to exercise reasonably for the protection of others.”].) In adding the language of “supervision” and “control” to section 272, the Legislature was thus not imposing a new duty on parents but simply incorporating the definition and limits of a traditional duty.

FN7 We note that terms similar to “supervision” and “control” have also been used for some time in dependency law. Indeed, the version of Welfare and Institutions Code section 300, subdivision (a), in effect before, during, and for three months after the enactment of the amendment, referred to “proper and effective parental care or control.” (Stats. 1986, ch. 1122, § 2, p. 3976; language changed by Stats. 1987, ch. 1485, § 4, p. 5603, operative Jan. 1, 1989.) Defendants urge that the established meaning of the term “control” in dependency law also serves to clarify its meaning in the amendment.

A reading of dependency cases reveals, however, that the term “parental control” has been employed in those cases primarily in the context of a parent's ability to provide the necessities of life and to refrain from harming the child. (See, e.g., *Marr v. Superior Court* (1952) 114 Cal.App.2d 527, 530 [250 P.2d 739] [“the usual incidents of the exercise of control over” a child are “its proper care and support”]; *In re Corrigan* (1955) 134 Cal.App.2d 751, 755 [286 P.2d 32] [mother's inability to exercise proper control evidenced by failure to protect children from abuse by their father and by leading a “nomadic life of moral poverty and insecurity” that kept them out of school]; *In re Edward C.* (1981) 126 Cal.App.3d 193, 202-203 [178 Cal.Rptr. 694] [father's inability to exercise proper parental control evidenced by “cruel and inhuman corporal punishment” of children].) In that context, a parent's success or failure in fulfilling this duty to control is assessed by the resulting care

and support given to the child, as measured by statutory standards such as those in Welfare and Institutions Code section 300. (See fn. 6, *ante*.) Thus, “control” in dependency law is roughly synonymous with “care” and “protection” as used in the amendment. The term has not been employed in dependency law in the sense of regulation of a child's behavior or prevention of a child's delinquent conduct.

(6) As for the scope of this duty, “California follows the Restatement rule (Rest. 2d Torts, § 316), which finds a ‘special relationship’ between parent and child, and accordingly places upon the parent ‘a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.’ ” (*Robertson v. Wentz* (1986) 187 Cal.App.3d 1281, 1288 [232 Cal.Rptr. 634].)

(7) We “assume that in passing a statute the Legislature acted with full knowledge of the state of the law at the time.” (*In re Misener* (1985) 38 Cal.3d 543, 552 [213 Cal.Rptr. 569, 698 P.2d 637].) (3d) When the amendment was enacted, parental tort liability for breach of the duty of supervision and control was a doctrine of long standing. We thus find the terms “supervision” and “control” in the amendment to section 272 to be consistent with the definition and limits of the parental duty established in the law of torts. Welfare and Institutions Code sections 601 and 602 are, of course, concerned with a child's delinquent behavior, not simply a child's harmful behavior. Therefore, we understand the amendment to describe the duty of reasonable restraint of, and discipline for, a child's delinquent acts by parents who know or should know that their child is at risk of delinquency and that they are able to control the child.

It is true that neither the amendment nor prior case law sets forth specific acts that a parent must perform or avoid in order to fulfill the duty of supervision and control. We nonetheless find the duty to be sufficiently certain even though it cannot be defined with precision. ^{FN8} To plaintiffs' complaint that the amendment is subjective and imprecise, defendants reply *573 that the amendment's lack of specificity concerning the boundaries of the duty is both inevitable and desirable. We agree with defendants that it would be impossible to provide a

comprehensive statutory definition of reasonable supervision and control. Unlike the statute at issue in Kolender v. Lawson, supra, 461 U.S. 352, which was invalidated because it failed to provide standards by which to evaluate the “credible and reliable” identification it required, the present amendment is not susceptible of exegesis in an apt sentence or two.

FN8 It is instructive to note that in dependency cases terms similar to “supervision” and “control” have withstood challenge on vagueness grounds even though “[f]ew [dependency] cases have attempted to define ‘proper and effective parental care or control’ [citation], since in most cases ... it is easier to describe what is not proper parental care and control.” (In re Edward C., supra, 126 Cal.App.3d at p. 202; see, e.g., In re J. T. (1974) 40 Cal.App.3d 633, 638 [115 Cal.Rptr. 553] [upholding the phrase “proper and effective parental care or control” in former Welfare and Institutions Code section 600, subdivision (a)]; In re Baby Boy T. (1970) 9 Cal.App.3d 815, 818-819 [88 Cal.Rptr. 418] [upholding the phrase “incapable of supporting or controlling the child in a proper manner” in Civil Code former section 232, subdivision (g)].) As previously noted, of course, the term “parental control” in dependency law is not synonymous with that in tort law. (See fn. 7, ante.)

We also agree that a statutory definition of “perfect parenting” would be inflexible and not necessary to identify the egregious breaches of parental duty that come within the statute’s purview. The concept of reasonableness serves as a guide for law-abiding parents who wish to comply with the statute. “As the Supreme Court said in Go-Bart Importing Co. v. United States (1931) 282 U.S. 344, 357 [75 L.Ed.2d 374, 382, 515 S.Ct. 153], ‘There is no formula for the determination of reasonableness.’ Yet standards of this kind are not impermissibly vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind.” (People v. Daniels (1969) 71 Cal.2d 1119, 1129 [80 Cal.Rptr. 897, 459 P.2d 225, 43 A.L.R.3d 677].) (8) One can devise hypotheticals to demonstrate the difficulty of deciding whether particular parental acts were reasonable, but “statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.” (United States v.

National Dairy Corp. (1963) 372 U.S. 29, 32 [9 L.Ed.2d 561, 565, 83 S.Ct. 594].)

(3e) Section 272 holds parents liable only if they are criminally negligent in breaching their duty of supervision and control. This requirement of criminal negligence arises in part from Penal Code section 20, which provides, “In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.” It also arises in part from the Legislature’s use of the term “reasonable” in the amendment. The duty to act “reasonably” reflects the applicability of the negligence doctrine—here, criminal, not civil, negligence.

(9) In the criminal context, “ordinary negligence sufficient for recovery in a civil action will not suffice; to constitute a criminal act the defendant’s conduct must go beyond that required for civil liability and must amount to a ‘gross’ or ‘culpable’ departure from the required standard of care.” (People v. Peabody (1975) 46 Cal.App.3d 43, 47 [119 Cal.Rptr. 780].) (3f) It *574 follows that the amendment to section 272 punishes only negligence that exceeds ordinary civil negligence. We have defined criminal negligence as “ ‘aggravated, culpable, gross, or reckless, that is, ... such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to [demonstrate] ... an indifference to consequences.’ ” (People v. Penny (1955) 44 Cal.2d 861, 879 [285 P.2d 926].)

The heightened requirements of the criminal negligence standard in regard to breach of duty alleviate any uncertainty as to what constitutes reasonable supervision or control. Plaintiffs fear the statute punishes parents who could not reasonably know that their child is at risk of delinquency. As we have seen, however, only a parent who “knows or should know of the necessity and opportunity for exercising ... control” can be held liable in tort for breaching the duty to control a child. (Robertson v. Wentz, supra, 187 Cal.App.3d at p. 1288.) Similarly, there can be no criminal negligence without actual or constructive knowledge of the risk. (See People v. Rodriguez (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].) In the setting of involuntary manslaughter, for example, “[c]riminal liability cannot be predicated on every careless act merely because its carelessness results in injury to another. [Citation.] The act must be one which has knowable and apparent potentialities for resulting in death. Mere inattention or mistake in judgment resulting even in death of another is not criminal unless the

quality of the act makes it so.” (*Ibid.*) Under the criminal negligence standard, knowledge of the risk is determined by an objective test: “[I]f a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness.” (*People v. Watson* (1981) 30 Cal.3d 290, 296 [179 Cal.Rptr. 43, 637 P.2d 279].) The amendment thus punishes only parents who know or reasonably should know that their child is at risk of delinquency.

Plaintiffs also fear the statute punishes parents who try but fail to control their children. In tort law, however, “[t]he duty of a parent is only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of so doing. The parent is not under a duty so to discipline his child as to make it amenable to parental control when its exercise becomes necessary to the safety of others.” (*Rest.2d Torts*, § 316, com. b.) In other words, a parent who makes reasonable efforts to control a child but is not actually able to do so does not breach the duty of control. This is consistent with the rule that “there is no [civil] liability upon the parent unless he has had an opportunity to correct specific propensity on the part of the child, and that it is too much to hold the parent responsible for general incorrigibility and a bad disposition.” (*Singer v. Marx, supra*, 144 Cal.App.2d at p. 644.) A fortiori, parents who reasonably try but are unable to control their children are not criminally negligent. *575

The criminal negligence standard in regard to breach of duty thus provides notice to law-abiding parents that is consistent with and reinforces the notice provided by the amendment's incorporation of the definition and limits of the tort duty of parental supervision and control. The amendment requires parents who know or reasonably should know of the child's risk of delinquency to exercise their duty of supervision and control. This duty consists of undertaking reasonable-not necessarily successful-efforts at supervision and control. Omission of this duty owing to simple negligence will not subject the parent to criminal liability; a parent can be convicted only for gross or extreme departures from the objectively reasonable standard of care.

In sum, we understand the Legislature to have intended the amendment to provide that there is a duty of reasonable restraint of, and discipline for, a child's delinquent acts by parents who know or should know that their child is at risk of delinquency and that they are able to control the child. Parents

who intentionally or with criminal negligence fail to perform this duty, and as a result contribute to the delinquency of the child, violate section 272.

Thus understood, the amendment is specific enough to allow parents to identify and avoid breaches of the duty of supervision and control for which they could be penalized under section 272. The amendment does not trap the innocent. It provides adequate notice to parents with regard to potential criminal liability for failure to supervise and control their children because (1) it incorporates the definition and the limits of a parental duty to supervise and control children that has long been a part of California tort law, and (2) it imposes criminal liability only when the parent engages in conduct that so grossly departs from the standard of care as to amount to criminal negligence.

B. Enforcement

In addition to affording notice to citizens, due process requires that the amendment to section 272 provide standards for its application and adjudication in order to avoid the dangers of arbitrary and discriminatory enforcement. (*Grayned v. City of Rockford, supra*, 408 U.S. at pp. 108-109 [33 L.Ed.2d at pp. 227-228].) (1b) Indeed, the requirement of guidelines for law enforcement is “the more important aspect of the vagueness doctrine.” (*Kolender v. Lawson, supra*, 461 U.S. at p. 358 [75 L.Ed.2d at p. 909].) The reason for its importance is that “[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” (*Ibid.*)

At issue in *Kolender v. Lawson, supra*, 461 U.S. 352, was a statute construed to require people accused of loitering to provide “credible and *576 reliable” identification. Holding the statute unconstitutionally vague, the high court noted that its lack of any standard for determining how a suspect should meet the requirement “vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute” (*Id.* at p. 358 [75 L.Ed.2d at p. 909].)

(3g) Unlike the statute in *Kolender*, the amendment to section 272 as construed herein does not vest “virtually complete discretion” in law enforcement officials. Although the amendment contains no explicit description of the parental duty, it incorporates a preexisting definition from tort law that supplies sufficient guidance to police,

prosecutors, and juries charged with enforcing it, and thereby minimizes the danger of arbitrary or discriminatory enforcement.

Application of the criminal negligence standard facilitates enforcement and adjudication of the amendment. Although the standard does not with specificity proscribe parental conduct or omission, it aids those who would enforce parental duty in providing a measure by which to assess a parent's knowledge of or authority over a child's delinquent activities.

The causation element of section 272 also reduces the likelihood of arbitrary or discriminatory enforcement. A parent will be criminally liable only when his or her criminal negligence with regard to the duty of reasonable supervision and control "causes or tends to cause or encourage" the child to come within the provisions of Welfare and Institutions Code sections 601 or 602. The Court of Appeal expressed concern about the difficulty of determining whether there is in fact a causal link between parental behavior and juvenile delinquency. It is true that the causation element of section 272 could be more difficult to apply when the question is whether a parent's failure to supervise or control a child caused the child to become delinquent than when the parent's potentially culpable conduct is of a more direct nature—for example, when the parent is an accomplice of the minor in the commission of a crime. Although there may be circumstances in which reasonable minds could differ as to whether a parent's inadequate supervision or control caused or tended to cause the child's delinquency, the same causation question has been an element of the tort liability of a parent for failure to exercise reasonable supervision and control. In that context, causation has not proved unduly troublesome. Furthermore, the opportunity for parental diversion from criminal prosecution under section 272 in less egregious cases suggests that as a practical matter a parent will face criminal penalties under section 272 for failure to supervise only in those cases in which the parent's culpability is great and the causal connection correspondingly clear. *577.

We therefore conclude that the amendment to section 272 as construed herein does not "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Gravned v. City of Rockford, supra, 408 U.S. at pp. 108-109 [33 L.Ed.2d at p. 228].) Although the amendment calls for

sensitive judgment in both enforcement and adjudication, we would not be justified in assuming that police, prosecutors, and juries are unable to exercise such judgment.

III. Overbreadth

(10a) Like a vagueness challenge, an overbreadth challenge implicates the constitutional interest in due process of law. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7, subd. (a), 24.) The overbreadth doctrine provides that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." (NAACP v. Alabama (1964) 377 U.S. 288, 307 [12 L.Ed.2d 325, 338, 84 S.Ct. 1302].)

(11a) Plaintiffs contend that the amendment is overbroad on its face because it infringes on the right of intimate family association protected by both the federal and state Constitutions. This contention is without merit.

(12) Plaintiffs emphasize the fundamental nature of the rights at stake in matters of child rearing. We need no convincing of their significance; we have already recognized that "[t]he concept of personal liberties and fundamental human rights entitled to protection against overbroad intrusion or regulation by government ... extends to ... [citations] such basic liberties and rights not explicitly listed in the Constitution [as] the right 'to marry, establish a home and bring up children' [citation]; the right to educate one's children as one chooses [citation]; ... and the right to privacy and to be let alone by the government in 'the private realm of family life.' [Citations.]" (City of Carmel-by-the-Sea v. Young (1970) 2 Cal.3d 259, 266-267 [85 Cal.Rptr. 1 [466 P.2d 225, 37 A.L.R.3d 1313].)

(10b) Nevertheless, a facial overbreadth challenge is difficult to sustain. The high court has emphasized that "[a]pplication of the overbreadth doctrine ... is, manifestly, strong medicine. It has been employed ... sparingly and only as a last resort." (Broadrick v. Oklahoma (1973) 413 U.S. 601, 613 [101 L.Ed.2d 1, 17, 108 S.Ct. 2225].) Consequently, to justify a conclusion of facial overbreadth, "the overbreadth of a statute must not only be real, but substantial as well" (*Id.* at p. 615 [37 L.Ed.2d at p. 842].)*578 Applying this test, the high court declined to strike down a statute altering the definition of "private"

clubs for antidiscrimination purposes because the plaintiff failed to “demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [statute] cannot be applied constitutionally No record was made in this respect, we are not informed of the characteristics of any particular clubs, and hence we cannot conclude that the [statute] threatens to undermine the associational or expressive purposes of any club, let alone a substantial number of them.” (*New York State Club Assn. v. New York City* (1988) 487 U.S. 1, 14 [101 L.Ed.2d 1, 17, 108 S.Ct. 2225].)

(11b) Here plaintiffs likewise fail to show that the amendment is substantially overbroad. Their argument consists of brief and general assertions of the amendment's “limitless reach” into “virtually every aspect of child rearing and intimate family association,” authorizing “law enforcement personnel to second guess every parental decision” (Italics added.) These assertions lack the kind of particularity required by the high court in *New York State Club Assn. v. New York City, supra*, 487 U.S. at page 14 [101 L.Ed.2d at pages 16-17], and, by themselves, do not compel the conclusion that the statute is overbroad. Although the right of intimate family association is constitutionally protected, a statute that seeks to regulate parental behavior is not overbroad per se.

Moreover, plaintiffs premise their assertions on the contention that the amendment makes a “standardless intrusion ... into the intimate area of parent-child relationships.” As discussed in our vagueness analysis (pt. II, *ante*), however, the amendment is not standardless: it incorporates the definition and limits of the parental tort duty of supervision and control. That definition and those limits guard against any excessive sweep by the criminal prohibition. Because plaintiffs do not show that “a substantial number of instances exist in which the [amendment as construed] cannot be applied constitutionally” (*New York State Club Assn. v. New York City, supra*, 487 U.S. at p. 14 [101 L.Ed.2d at p. 17]), we “cannot conclude that the [amendment] is substantially overbroad and must assume that ‘whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.’ [Citation.]” (*Ibid.*)

We therefore conclude that the amendment to section 272 does not, on its face, “sweep unnecessarily broadly and thereby invade the area of protected freedoms.” (*NAACP v. Alabama, supra*, 377 U.S. at

p. 307 [12 L.Ed.2d at p. 338].)*579

The judgment of the Court of Appeal is reversed with directions to affirm the judgment of the trial court.

Lucas, C. J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred. *580
Cal. 1993.

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5 Cal.4th 561, 853 P.2d 507, 20 Cal.Rptr.2d 341

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72 Ops. Cal. Atty. Gen. 216, 1989 WL 408277 (Cal.A.G.)

Office of the Attorney General
State of California
*1 Opinion No. 89-601

October 24, 1989

THE HONORABLE ARLO SMITH
DISTRICT ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO

THE HONORABLE ARLO SMITH, DISTRICT ATTORNEY, CITY AND COUNTY OF SAN FRANCISCO, has requested an opinion on the following question:

Is a ballet teacher employed by a private ballet school required to report instances of child abuse under the Child Abuse and Neglect Reporting Act?

CONCLUSION

A person who teaches ballet at a private ballet school is required to report instances of child abuse under the Child Abuse and Neglect Reporting Act.

ANALYSIS

The Child Abuse and Neglect Reporting Act (Pen.Code, 11165 et seq.) creates a system whereby "child protective agencies" (i.e., police and sheriff's departments and county welfare and probation departments) can be promptly notified of suspected instances of child abuse so that they can take timely action if necessary to protect the children. [FN1] (65 Ops.Cal.Atty.Gen. 345, 347 (1982); cf., Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal.App.3d 245, 258, 267, 272, 279; see also, Krikorian v. Barry (1987) 196 Cal.App.3d 1211, 1216-1217.) The Act does this by requiring certain categories of persons whose occupations place them in contact with children to report to a "child protective agency" when, in the course of their work, they come to know or reasonably suspect that someone under the age of eighteen has been a victim of child abuse. (§ 11166, subd. (a).) These persons are provided with an absolute immunity from any civil or criminal liability in connection with any report they are required or authorized to make under the Act (§ 11172, subd. (a); cf., Krikorian v. Barry, supra, 196 Cal.App.3d 1211, 1215), but their failure to make a required report is a misdemeanor, carrying a maximum punishment of six months in jail and a \$1,000 fine. (§ 11172, subd. (e).)

Among the persons who are required to report instances of child abuse are "child care custodians" (§ 11166, subd. (a)), a broad category that includes teachers, day care workers, and a variety of public health and educational professionals. (§ 11165.7; cf., § 11166.5, subd. (a); Planned Parenthood Affiliates v. Van de Kamp, supra). We are asked whether a ballet teacher who teaches ballet at a particular private ballet school is included among them. We conclude that such a person is included in the category of persons who must report instances of child abuse under

the Child Abuse and Neglect Reporting Act.

Since the nature of the position and the school has prompted the request for this Opinion, we describe it here as it has been described to us in information accompanying the opinion request: The San Francisco Ballet School is an arm of the San Francisco Ballet Association, a private non-profit organization which operates independently from the City and County of San Francisco. The School derives operating revenue from student tuition for its classes and from funds provided by the Ballet Association. The Ballet Association does not receive general fund revenue from the City and County of San Francisco, but it does receive a grant award as a non-profit private entity from the latter's Publicity and Advertising Fund which is established through the collection of hotel tax revenue.

*2 The Ballet School holds an " Authorization to Operate As a Private Postsecondary Educational Institution" issued by the State of California Department of Education because it has been accredited for its nondegree objective by a national accreditation agency (the National Association of Schools of Dance) recognized by the U.S. Department of Education. (Ed.Code, § 94311, subd. (c) [FN2]; see generally, 68 Ops.Cal.Atty.Gen. 278 (1985); 67 Ops.Cal.Atty.Gen. 250 (1984).) The school may participate in the Student Tuition Recovery Fund" , and since it meets the Department of Health, Education and Welfare's definition of an institution of higher education, it is eligible to apply for participation in various student financial assistance programs administered by the Federal Office of Education.

The teaching staff of the Ballet School is composed primarily of former professional ballet dancers. These teachers are not trained as academic personnel in the traditional sense, but rather are performing artists who have studied at some of the most prestigious ballet institutions around the world. They do not hold academic degrees in education and they do not necessarily possess teaching certificates or credentials from the State. (Cf., Ed.Code, §§ 44001-44005, 44250.)

The School accepts students beginning at eight years of age, and provides instruction and performance opportunities (including performances with the Ballet Company) that prepare them for careers as professional ballet performers. [The School also provides adult classes for persons who are not artists or performers.] The School does not provide " academic" instruction (except as it may bear on dance history and performance technique), and attendance at it is not mandatory as it is in public or private educational schools. (Ed.Code, §§ 48200, 48220, 48222.) [FN3]

In addition to regular classes held at the School, the Ballet School conducts a local outreach program in the public schools in San Francisco. This consists of introductory dance sessions or classes in those schools at which the regular public school teachers are always present. The Ballet School teachers who attend this activity are considered to be guest artists or performers. Student attendance at the sessions and classes is required as part of the regular public school arts educational program. A public school student may go on to take dance lessons at the Ballet School itself, but that would not be a mandatory part of his or her regular public education.

It is patent from the foregoing that in the course of his or her profession, a ballet teacher at the San Francisco Ballet School is in daily contact with persons under the age of eighteen. It would also seem fair to say that because of the

nature of ballet classes, the ballet teacher would be in a special position to observe instances of child abuse. To return to our question then, when he or she comes to know or reasonably suspect that a student at the School has been a victim of child abuse, must he or she report it under the Child Abuse and Neglect Reporting Act?

*3 Our task in answering the question is to ascertain the intent of the Legislature: Did the Legislature intend for such private school ballet teachers to be included in the class of persons for whom reporting child abuse is compulsory under the Child Abuse and Neglect Reporting Act? (Cf., Planned Parenthood Affiliates v. Van de Kamp, supra, 181 Cal.App.3d 245, 267; Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645.) To ascertain that intention we turn first to the words of the statute itself. (People v. Stockton Pregnancy Control Medical Clinic, Inc. (1988) 203 Cal.App.3d 225, 235; Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230; Rich v. State Board of Optometry (1965) 235 Cal.App.2d 591, 604.)

Section 11166, subdivision (a) of the Child Abuse and Neglect Reporting Act provides in pertinent part as follows:

" [A]ny child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident.... For the purposes of this article, 'reasonable suspicion' means that it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse...." (Emphasis added.)

For purposes of the Act, the term " child care custodian" is defined in section 11165.7, subdivision (a), to mean:

" a teacher; an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education; a classified employee of any public school who has been trained in the duties imposed by this article, if the school has so warranted to the State Department of Education; an administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensee, an administrator, or an employee of a licensed community care or child day care facility; [a] headstart teacher; a licensing worker or licensing evaluator; [a] public assistance worker; an employee of a child care institution including, but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer or any person who is an administrator or presenter of, or a counselor in, a child abuse prevention program in any public or private school." (§ 11165.7, subd. (a), as amended by Stats. 1987, ch. 1459, § 14; emphases added.)

*4 Looking at the words and phrases, and the punctuation (cf., Wholesale T. Dealers v. National Etc. Co. (1938) 11 Cal.2d 634, 659; Paris v. County of Santa Clara (1969) 270 Cal.App.2d 691, 699) of subdivision (a) of section 11165.7, we see that the Legislature has now used semicolons to designate distinct subcategories of

persons within the overall category of " child care custodians" who must report instances of child abuse. With respect to those who are involved with students in school they include

- teachers;
- instructional aides, teacher's aides, or teacher's assistants employed by any public or private school, who have been trained in the duties imposed by the Child Abuse and Neglect Reporting Act, if their school district has so warranted to the State Department of Education; [FN4]
- classified employees of any public school who have been trained in the duties imposed by the Act, if the school has so warranted to the State Department of Education;
- administrative officers, supervisors of child welfare and attendance, or certificated pupil personnel employees of any public or private school;
- headstart teachers; and
- persons who are administrators or presenters of, or counselors in, a child abuse prevention program in any public or private school.

A ballet teacher at the San Francisco Ballet School would not fall in any of the last four of these subcategories. Neither would he or she fall into the second category-that of aides and assistants, because he or she would have primary responsibility for instruction in his or her ballet class and so would not be an aide or assistant to someone else. And even when he or she appears at a public school, he or she does so as a guest performer and not as a teacher's aide or assistant regularly employed at that school. Thus if the ballet teacher is to fall in any of the subcategories of " child care custodians" who must report child abuse under the Act, it would have to be in the first, as a " teacher" . The question thus becomes whether he or she is a " teacher" within the meaning of the Child Abuse and Neglect Reporting Act.

The term " teacher" is not defined in the Child Abuse and Neglect Reporting Act or elsewhere in the Penal Code. Absent that, the word as used in the Act should be interpreted according to its usual, ordinary and generally accepted meaning. (Cf., People v. Craft (1986) 41 Cal.3d 554, 560; People v. Castro (1985) 38 Cal.3d 301, 310; People v. Belleci (1979) 24 Cal.3d 879, 884; Palos Verdes Faculty Assn v. Palos Verdes Peninsula Unified Sch. Dist. (1978) 21 Cal.3d 650, 658; Great Lakes Properties Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 155-156.) There, reference to the dictionary is helpful to understand the common generally accepted meaning of the term. (Cf., People v. Spencer (1975) 52 Cal.App.3d 563, 565; People v. Medina (1972) 27 Cal.App.3d 473, 479; People v. Johnson (1957) 147 Cal.App.2d 417, 419.) Indeed, in a recent Opinion, 70 Ops.Cal.Atty.Gen. 139 (1987), we looked to the dictionary to discern the meaning of the phrase " teaching staff" . (Id. at 144.)

*5 Doing so here, we see that the term " teacher" is defined, inter alia, as " one whose occupation is to instruct" , as for example " a driving teacher." (Webster's Third New Intn'l. Dict. (1971 ed.) at p. 2346.) And the term " teach" , we are told, " is a general term for causing one to acquire knowledge or skill, usu[ally] with the imparting of necessary incidental information and the giving of incidental help and encouragement" , as in teaching " boys how to swim." (Ibid.)

There is nothing in the definition of " teacher" or " teach" to suggest that either is in any way limited to particular subjects, knowledge, or skills. It seems clear that one whose occupation is to instruct others in the skill of dance

is a "teacher" in the ordinary use of the word, and we thus consider the ballet teacher here to be a teacher within the common meaning of the term.

We are to construe the Child Abuse and Neglect Reporting Act "according to the fair import of [its] terms, with a view to effect its objects and to promote justice." (Pen.Code, § 4.) In looking at "the ordinary import of the language used in framing [it]" (Moyer v. Workmen's Comp. Appeals Bd., supra, 10 Cal.3d 222, 230; In re Alpine (1928) 203 Cal. 731, 737) " [a] narrow or restricted meaning should not be given to a word, if it would result in an evasion of the evident purpose of the act, when a permissible, but broader, meaning would prevent the evasion and carry out that purpose." (In re Reiniger (1920) 184 Cal. 97, 103.)

The purpose of the Reporting Act is to detect and prevent child abuse, an objective in which the State of California has a significant state interest. (People v. Stritzinger (1983) 34 Cal.3d 505, 511-512; People v. Stockton Pregnancy Control Medical Clinic, Inc., supra, 203 Cal.App.3d 225, 241; Planned Parenthood Affiliates v. Van de Kamp, supra, 181 Cal.App.3d 245, 258, 279; 65 Ops.Cal.Atty.Gen. 345, 347, supra.) As noted at the outset, the primary means in which the Act's purpose of protecting victims from child abuse is attained, is to have child abuse agencies promptly notified of its occurrence. (Cf., People v. Stritzinger, supra, at 511-512; People v. Stockton Pregnancy Control Medical Clinic, Inc., supra, at 241; Krikorian v. Barry, supra, 196 Cal.App.3d 1211, 1216-1217; Planned Parenthood Affiliates v. Van de Kamp, supra, at 258-259, 267, 272, 279; 65 Ops.Cal.Atty.Gen. 345, 347, supra.) To ensure that that occurs, the Legislature has decided that when persons engage in certain callings which bring them into contact with persons under eighteen years of age, they must assume a responsibility to report instances of child abuse that they come to know about or suspect through that contact. (§ 11166, subd. (a); cf., Planned Parenthood Affiliates v. Van de Kamp, supra, 181 Cal.App.3d 245, 272.)

Originally, reporting was required only of physicians (former § 11161.5 added by Stats. 1963, ch. 576, § 1, p. 1454), reflecting a belief that they "were in a unique position to discover child abuse and particularly the battered child syndrome." (Comment, Reporting Child Abuse: When Moral Obligations Fail (1983) Pacific L.J. 189, 213; fn. omitted.) But over the years the Legislature has expanded the categories of persons who have a duty to report. [FN5] (Cf., Kimberly M. v. Los Angeles Unified School Dist. (1987) 209 Cal.App.3d 1326, 1333; see also, Comment, supra, 15 Pacific L.J. at 213-214 & 213 fn. 223.) School superintendents and principals became mandatory reporters in 1966 (Stats. 1966, First Ex. Sess., ch. 31, § 2, p. 325), and the law was amended in 1971 to include school teachers. (Stats. 1971, ch. 1729, § 7, p. 3680). "Thus school teachers and administrative officers [became] designated 'child care custodians' charged with mandatory reporting duties, the violation of which is a misdemeanor." (Kimberly M. v. Los Angeles Unified School Dist., supra, 209 Cal.App.3d at 1333.)

*6 If we look at the 1971 amendments to the statute which originally imposed the duty on teachers to report child abuse under the precursor of the Child Abuse and Neglect Reporting Act, former section 11161.5 of the Penal Code, we see that it imposed that duty on "any teacher or [sic, of] any public or private school." (Stats. 1971, ch. 1729, § 7, p. 3680.) [FN6] The Legislature thus clearly included persons who taught in private schools among those who would have a duty to report. But in so doing the Legislature did not impose any restriction or limitation on the types of private school teachers who would have that duty, based either on what they taught, or on the types of private schools at which they might

teach. (Cf., Emmolo v. Southern Pacific Co. (1949) 91 Cal.App.2d 87, 92; 64 Ops. Cal. Atty. Gen. 192, 202 (1981); 62 Ops. Cal. Atty. Gen. 394, 395-396 (1979); 20 Ops. Cal. Atty. Gen. 31, 33 (1952): [effect of the use of the indefinite adjective "any"].) The plain wording of the statute which imposed the reporting duty on "any teacher of any public or private school" thus included among those upon whom it imposed the reporting duty, persons who might teach ballet at a private non-academic ballet school.

In 1980, the child abuse reporting laws were substantially recast and collected into article 2.5. (Stats. 1980, ch. 1071, §§ 1-4, p. 3420; 4 Stats. 1980 [Sum. Dig. SB 781] at p. 333; cf., Krikorian v. Barry, supra, 196 Cal.App.3d 1211, 1216-1217.) The language of former section 11161.5, which imposed the duty to report child abuse on "any teacher ... of any public or private school", was carried through to the definition of "child care custodian", which was now set forth as section 11165, subdivision (h). (Stats. 1980, ch. 1071, § 4, p. 3421.) [FN7] "Child care custodian was defined to mean-

"a teacher, administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensed day care worker; an administrator of a community care facility licensed to care for children; headstart teacher; public assistance worker; employee of a child care institution including but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer." (Former 11165, subd. (h), as added by Stats. 1980, ch. 1071, § 4, supra; emphasis added.)

Section 11165 was repealed in 1987 (Stats. 1987, ch. 1459, § 1) when the definition of "child care custodian" was transferred to newly adopted section 11165.7, where it appears today. (Stats. 1987, ch. 1459, 14, supra.)

However, as it appears today, the definition of "child care custodian" no longer speaks of "a teacher ... of any public or private school" as it did until 1987. It speaks merely of "a teacher" without any qualification. Thus any reason to exclude persons who might teach in particular types of private schools is even less compelling than before. We thus are reinforced in our conclusion that the definition of child care custodian found in section 11165.7 includes persons who teach ballet at a private ballet school.

*7 It has been suggested that our reading of the meaning of "teacher" is too broad. It is pointed out that if the term were indeed so encompassing, there would have been no need to include "headstart teachers" among the occupations listed as "child care custodians" in 1980 (Stats. 1980, ch. 1071, § 4, p. 3421) because the subcategory of "teacher[s] ... of any public or private school" would have already sufficed to include them. That would have made the addition of the subcategory of "headstart teachers" unnecessary, and statutes are supposed to be interpreted to avoid surplusage. (Cf., City and County of San Francisco v. Farrell (1982) 32 Cal.3d 47, 55; California Mfgs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836, 844; Fields v. Eu (1976) 18 Cal.3d 322, 328.)

The suggestion is that the term "teacher" should only apply to persons who teach in those K-12 public and private schools which a pupil must attend under the Compulsory Education Law. (Cf., fn. 3, ante.) After all, those schools and teachers already have broad authority over children and a concomitant duty and responsibility for their care and supervision. (Cf., Kimberly M. v. Los Angeles Unified School Dist., supra, 209 Cal.App.3d 1326, 1331-1332, 1337-1338.) And

public school teachers, at least, are specifically given training in the detection of child abuse (Cf., § 11165.7, subds. (b), (c); Ed.Code, 44691.) As the argument goes, ballet teachers at private ballet schools would not be the type of trained "professionals" upon whose judgment and experience the Legislature relied "to distinguish between abusive and nonabusive situations" when it adopted the Child Abuse and Neglect Reporting Act. (Cf., Planned Parenthood Affiliates v. Van de Kamp, supra, 181 Cal.App.3d 245, 258-259, 272.) [FN8]

We reject the position and the associated suggestion that the term "teacher" as used in the Act only applies to persons who teach in public and private K-12 schools. First, we do not view the addition of "headstart teachers" as in any way derogating from the basic meaning of "teachers." That category is used without any qualification, which means any kind of teacher. We believe "headstart teachers" were specifically mentioned as "child care custodians" to make sure that those pre-school teachers were included among those who would have a reporting duty under the Act. Their addition could not have been meant to limit the existing subcategory of "teachers" as "child care custodians" for to turn the argument about: what types of teachers would have then been excluded, because "headstart teachers" were now included in the definition of "child care custodian" ?

Without intending to suggest that the meaning of the word "teacher" as found in the Act is without bounds and mandates a reporting duty on any person who happens to impart some knowledge or skill to a child, we do not accept the proffered limitation that it applies only to teachers in K-12 schools. We find nothing in the statutory language of the Child Abuse and Neglect Reporting Act to support such a limitation on the plain meaning of the word "teacher" . Second, it bears noting that the particular private Ballet School that has been described does not operate free from all governmental oversight. It is "licensed" by a state agency to operate as a Private Postsecondary Educational Institution in California (cf., Ed.Code, § 93411, subd. (c), supra, fn. 2), and its credentials permit it to participate in the Student Tuition Recovery Fund and to apply for other student financial assistance programs. In its operation, it deals with students as young as eight years of age, whom it owes as much a duty of care and supervision as does a public or private K-12 school. (Cf., Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal.3d 508, 518-520; Kimberly M. v. Los Angeles Unified School Dist., supra, 209 Cal.App.3d 1326, 1337 fn. 10; see generally, Comment, supra, 15 Pacific L.J. 189, 202207.)

*8 But most important, we cannot accept the notion that a ballet teacher at the School would not be a type of trained "professional" upon whose judgment and experience the Legislature relied to report known or suspected instances of child abuse. Such a person is professionally in contact with children on a regular and continuous basis (cf., Ed. Code, § 44690), and deals with them in a setting where evidence of child abuse may be uniquely readily apparent. We do not believe that "drawing when appropriate on his or her training and experience" (§ 11166.5, subd. (a)) he or she would be unqualified to make informed judgments regarding child abuse from empirical observation. (Cf., Planned Parenthood Affiliates v. Van de Kamp, supra, 181 Cal.App.3d at 259; Comment, supra, 15 Pacific L.J. at p. 214.) In this vein we note that the Act has imposed the obligation to report known or suspected instances of child abuse on other persons in the private sector, such as administrators of private day camps, employees of child day care facilities, and foster parents. (§ 11165.7.) We do not think it incongruous for the Legislature to

have intended that ballet teachers at private ballet schools have that duty as well.

The Child Abuse and Neglect Reporting Act imposes a duty on "teachers" to report instances of child abuse that they come to know about or suspect in the course of their professional contact in order that child protective agencies might take appropriate action to protect the children. We are constrained to interpret the language of the Act according to the ordinary meaning of its terms to effect that purpose. Doing so, we conclude that a person who teaches ballet at a private ballet school is a "teacher" and thus a "child care custodian" as defined by the Act, and therefore has a mandatory duty to report instances of child abuse under it.

KOHN K. VAN DE KAMP
Attorney General

Ronald M. Weiskopf
Deputy

[FN1]. The Child Abuse and Neglect Reporting Act (the "Act") is codified as article 2.5 (§§ 11165-11175.5) of chapter 2 of Title 1 of Part 4 of the Penal Code. Before 1987, when it received its current name (§ 11164 added by Stats. 1987, ch. 1444, 1.5), it was sometimes referred to as the Child Abuse Reporting Law. (See e.g., *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 255; 67 Ops.Cal.Atty.Gen. 235 (1984); 65 Ops.Cal.Atty.Gen. 345, 345 (1982).) All unidentified statutory references herein will be to the Act as codified in the Penal Code.

[FN2]. Section 94311 of the Education Code provides that no postsecondary educational institution may offer courses of education leading to educational, professional, technological, or vocational objectives unless it has been approved or authorized by the Superintendent of Public Instruction. One of the bases on which that approval/authorization is given is where "an institution ... has accreditation of the institution, program or specific course of study ... by a national or applicable regional accrediting agency recognized by the United States Department of Education...." (Ed.Code, § 94311, subd. (c).)

[FN3]. Under California's Compulsory Education Law (Ed.Code, § 48000 et seq.), every person between the ages of 6 and 16, not otherwise exempt, is required to attend public full-time day school. (Ed.Code, § 48200.) However, that obligation may be satisfied, inter alia, by attending a private full-time day school that meets certain statutory standards. (Id., § 48220.) Among them is that the private schools "offer instruction in the several branches of study required to be taught in the public schools of the state." (Id., § 48222; cf., 70 Ops.Cal.Atty.Gen. 282, 284-285 (1987).)

[FN4]. Subdivision (b) of section 11165.7 details the type of training contemplated. The Legislature has provided that "[t]raining in the duties imposed by [the Act] shall include training in child abuse identification and training in child abuse reporting" (§ 11165.7, subd. (b)) and that "[a]s part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements...." (Ibid.) It has also provided that "[s]chool districts which do not train the employees specified in subdivision (a)

[of section 11165.7] in the duties of child care custodians under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided." (Id., subd. (c).)

[FN5]. Over the years the Legislature also lessened the degree of certainty in the basis upon which a report would have to be made and increased the degree of civil and criminal immunity afforded mandatory reporters. (See Krikorian v. Barry, supra, 196 Cal.App.3d 1216-1217.) This was done to rectify the problem of inadequate child abuse reporting by removing two of the impediments which deterred professionals from reporting suspected cases of child abuse. (Ibid.)

[FN6]. As amended in 1971, section 11161.5 provided in pertinent part that:

"...in any case in which a minor is observed by ... any teacher or [sic, of] any public or private school ... and it appears to the ... teacher ... from observation of the minor that the minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person, he shall report such fact by telephone and in writing to the local police authority having jurisdiction and to the juvenile probation department. The report shall state, if known, the name of the minor, his whereabouts and the character and extent of the injuries. [¶] [¶] No person shall incur any civil or criminal liability as a result of making any report authorized by this section." (Stats. 1971, ch. 1729, § 7, supra.)

In 1973 the technical correction was made to have the section read "any teacher of any public or private school." (Stats 1973, ch. 1151, § 1, p. 2380; cf., 2 Stats. 1973 [Sum.Dig. SB 398] at p. 182.)

[FN7]. Before 1980, the number of different callings on which section 11161.5 imposed a duty to report child abuse had grown to twenty. (Stats. 1978, ch. 136, § 1, p. 358.) The 1980 amendments repealed that section (Stats. 1980, ch. 1071, § 1, supra) and adopted a new section 11165 which defined the mandatory reporters in broad categories-i.e., "child care custodian[s]" (subd. (h)), "medical practitioner[s]" (subd. (i)), "nonmedical practitioner [s]" (subd. (j)) and employees of "child protective agenc[ies]" (subd. (k)). (Id., 4, pp. 3421-3422; see, 65 Ops.Cal.Atty.Gen. 345, 346, supra; cf., Planned Parenthood Affiliates v. Van de Kamp, supra, 181 Cal.App.3d 245, 258.)

[FN8]. In support of this argument attention is also drawn to subdivision (a) of section 11166.5 of the Act which requires "any person who enters into employment on and after January 1, 1985, as a child care custodian, health practitioner, or with a child protective agency, prior to commencing his or her employment, and as a prerequisite to that employment, [to] sign a statement ... to the effect that he or she has knowledge of the [mandatory reporting] provisions of sections 11166. It is claimed that the Legislature would not have meant to impose such a precondition of employment on those in the private sector. This much of the argument we reject on the basis that the definition of child care custodian itself includes persons in the private sector.

72 Ops. Cal. Atty. Gen. 216, 1989 WL 408277 (Cal.A.G.)
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Commission on State Mandates

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Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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