



**The Reporter summarizes below the activities of those entities within state government which regularly review, monitor, investigate, intervene, or oversee the regulatory boards, commissions, and departments of California.**

## OFFICE OF ADMINISTRATIVE LAW

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The Office of Administrative Law (OAL) was established on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (APA) made by AB 1111 (McCarthy) (Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of all existing and proposed regulations against six statutory standards—necessity, authority, consistency, clarity, reference, and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted..." OAL has the authority to disapprove or repeal any regulation that, in its determination, does not meet all six standards. OAL is also authorized to review all emergency regulations and disapprove those which are not necessary for the immediate preservation of the public peace, health and safety or general welfare. The regulations of most California agencies are published in the California Code of Regulations (CCR), which OAL is responsible for preparing and distributing.

Under Government Code section 11340.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the APA are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. These non-binding OAL opinions are commonly known as "AB 1013 determinations," in reference to the legislation authorizing their issuance.

### MAJOR PROJECTS

**OAL Issues Determination.** On December 22, OAL released 1994 OAL Determination No. 1 (Docket No. 90-021), in response to a May 1990 request from the

Little Hoover Commission for a regulatory determination concerning five "advisory" bulletins issued by the Department of Education (DOE). Specifically, the Commission asked whether the following DOE advisories constitute regulations under the APA:

- Legal Advisory No. 2-89, alleged to compel "local school districts to reject 'Channel One' and other similar television news programs containing advertising by threatening to delete the portion of the time spent viewing such programs from the districts' certifications as to days and minutes of instruction..." (the "Channel One Advisory");

- Fiscal Management Advisory 89-04, which "purports to limit the discretion of local school districts by requiring the districts to restrict to a maximum of twenty hours the amount of time a student may work each week" (the "Work Permit Advisory");

- Two related Program Advisories (Number 89/9-2, dated October 12, 1989, and Number 89/9-5, dated November 6, 1988), which "expressly purport to formulate standards to interpret the supplementary grants program created by legislation implementing Proposition 98" (the "Supplemental Grants Advisories"); and

- Program Advisory 87/8-2, dated August 26, 1987, which "provides 'advice' concerning the use of categorical program funding after the 'sunset' of the provisions in the authorizing legislation regarding such use" (the "Categorical Funding Sunset Advisory").

According to OAL, the State Board of Education is the governing and policy determining body of DOE and has broad rulemaking authority; DOE executes the Board's rules and regulations, but also has rulemaking authority to execute its own duties. Accordingly, OAL initially concluded that the APA generally applies to DOE's quasi-legislative enactments because neither DOE nor the Board is in the judicial or legislative branch of the state government. Additionally, DOE's en-

abling statute expressly requires the Board, and by extension the Department, to comply with the "laws of this state" when adopting rules.

In concluding that portions of the challenged advisories are "regulations" within the meaning of the APA, OAL applied a two-part test. First, OAL determined that portions of the challenged advisories are either rules or standards of general application, or modifications or supplements to such rules. Second, OAL determined that DOE adopted the challenged advisories to either implement, interpret, or make specific the law enforced or administered by DOE or to govern DOE's procedure.

Regarding Legal Advisory No. 2-89, which was addressed to all County and District Superintendents, OAL determined that the advisory is clearly intended to have general application. OAL also found that DOE's advisory reflects its interpretation that student viewing of commercials is not an "education activity" within the meaning of the Education Code, is a "commercial enterprise" inconsistent "with the purpose for which schools are created," and may violate the "free school guarantee" of the California Constitution. According to OAL, courts, attorneys general, scholars, education commissioners, and policymakers disagree as to the legality and propriety of showing Channel One with its commercials in public schools; OAL concluded, therefore, that DOE's interpretation is not the only reasonable interpretation of statutory law and thus its interpretation is subject to APA rulemaking procedures.

Regarding DOE's Fiscal Management Advisory and Program Advisories at issue, OAL concluded that the advisories are intended to have general application. Although finding that certain parts of these advisories are not regulations, OAL determined that other parts do constitute regulations under the APA, and thus are void unless adopted pursuant to that Act.

OAL also determined that the portions of DOE's advisories which constitute regulations do not fall within any established exceptions to the APA and are therefore without legal effect.

**OAL Publishes Revamped APA Booklet.** In January, OAL released *California Rulemaking Law: Statutes and Regulations Governing the California Rulemaking Process*, a new compilation of the rulemaking portion of the APA as substantially reorganized by AB 2531 (Gotch) (Chapter 1039, Statutes of 1994). [14:4 CRLR 13] The new booklet contains the current version of the rulemaking portion of the APA, Government Code sections 11340-11359, OAL's regulations at



Title 1 of the CCR, a list of related statutes and legislative rules, and the text of the Permit Reform Act, Government Code section 15374-15378.

## BUREAU OF STATE AUDITS

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Created by SB 37 (Maddy) (Chapter 12, Statutes of 1993), the Bureau of State Audits (BSA) is an auditing and investigative agency under the direction of the Commission on California State Government Organization and Economy (Little Hoover Commission). SB 37 delegated to BSA most of the duties previously performed by the Office of Auditor General, such as examining and reporting annually upon the financial statements prepared by the executive branch of the state, performing other related assignments (such as performance audits) that are mandated by statute, and administering the Reporting of Improper Governmental Activities Act, Government Code section 10540 *et seq.* BSA is also required to conduct audits of state and local government requested by the Joint Legislative Audit Committee (JLAC) to the extent that funding is available. BSA is headed by the State Auditor, appointed by the Governor to a four-year term from a list of three qualified individuals submitted by JLAC.

The Little Hoover Commission reviews reports completed by the Bureau and makes recommendations to the legislature, the Governor, and the public concerning the operations of the state, its departments, subdivisions, agencies, and other public entities; oversees the activities of BSA to ensure its compliance with specified statutes; and reviews the annual audit of the State Audit Fund created by SB 37.

### MAJOR PROJECTS

**A Review of Service-Related Disability Retirements at Three Retirement Systems** (October 1994) is BSA's audit of the Public Employees' Retirement System (PERS), the City of Los Angeles Fire and Police Pension Systems, and the San Diego County Employees' Retirement Association, each of which provides disability retirement benefits to its members. Specifically, the audit focused on industrial disability retirement (IDR) benefits available for employees in so-called "safety" occupations, such as state traffic officers, state police officers, and correctional officers, and ordinary disability retirement (ODR) benefits which are paid to

members whose occupations are listed as eligible for IDR benefits but whose disability is not a result of the member's employment. According to BSA, an essential difference between ODR benefits and IDR benefits is that PERS applies an earnings limitation to ODR benefits, but not to IDR benefits.

The primary purpose of the audit was to determine the impact of applying earnings limitations currently applied only to members receiving ODR benefits to "safety" members receiving IDR benefits through PERS. According to BSA, if PERS were allowed to apply earnings limitations to members with earned income who receive IDR benefits, PERS would save approximately \$1.8 million per year by reducing member pensions for the 214 members included in BSA's survey, and a total of \$7.2 million by the time those members reach the age of 50. Accordingly, in response to the increasing costs of IDRs, BSA recommended that the legislature amend Government Code section 21300 to apply earnings limitations to retirees receiving IDR benefits who are earning income that, combined with their benefits, exceeds their preretirement income.

**Employees of the University of California, San Francisco, Improperly and Illegally Managed the Center for Pre-hospital Research and Training** (November 1994) is BSA's report following its investigation of a "whistleblower's" allegation of impropriety under the Reporting of Improper Governmental Activities Act. Specifically, BSA received an allegation that UCSF's Center for Pre-hospital Research and Training (CPRT) was improperly spending funds received from donors and from the state and paying expenses out of a secret, unauthorized checking account; further, the complainant alleged improprieties associated with contracts between UCSF and the San Francisco Fire Department. Among others, BSA found the following improper activities:

- A CPRT administrator had conflicts of interest related to contracts between UCSF and the fire department; these conflicts of interest resulted in the unauthorized use of University resources for the benefit of the fire department. For example, the CPRT administrator misspent UCSF resources by providing free paramedic training to twelve fire department employees at UCSF's expense; according to the report, the value of this paramedic training was at least \$49,000.

- A CPRT administrator and other CPRT and UCSF employees conspired to submit falsified payroll documents for the

purpose of paying at least 47 employees at a rate higher than approved by the University; as a result of these falsifications, UCSF paid the employees at least \$72,579 more than they were entitled to receive between January 1991 and March 1994.

- UCSF charged the fire department \$23,600 more than it should have under the terms of the contracts between UCSF and the fire department.

- Contrary to University policy, the CPRT opened a secret, unauthorized bank account; further, the CPRT spent most of the \$62,126 deposited in the account in an improper and imprudent manner. For example, the CPRT improperly used the bank account to pay salary advances to both UCSF employees and nonemployees; the CPRT improperly made automatic teller machine withdrawals of \$11,817 in cash over 18 months; and the CPRT had almost no internal controls over the bank account to help safeguard university resources.

- The CPRT established an unauthorized petty cash fund. Of the almost \$12,000 in the fund, only 40% of the expenditures were supported by receipts; 30% in expenditures could be explained but could not be supported by receipts; and 30% was either missing or not documented.

- The CPRT and the Foundation for Medicine illegally commingled restricted gifts totaling \$186,412 with other restricted and unrestricted funds of the CPRT; as a result, neither the CPRT nor the donors have any assurance that the funds were spent in accordance with the donors' instructions.

- The CPRT improperly deposited tuition fees of \$11,500 into a Foundation account instead of a UCSF account.

- When soliciting donations, the CPRT made false and misleading statements to donors concerning the CPRT's legal status.

- Both a CPRT administrator and another CPRT official misused University resources for their personal use and benefit. For example, the administrator used CPRT staff to perform personal work, such as arranging travel, performing bookkeeping, filing documents, and hiring a housekeeper and child care provider. Further the CPRT administrator used more than \$18,500 deposited in the Foundation to benefit herself and her relatives.

BSA concluded that UCSF "grossly mismanaged the CPRT" and, as a result, UCSF cannot assure the state's taxpayers that the University's funds were accounted for and spent properly. According to BSA, UCSF reports that it has taken action to correct some of these problems; for example, both the outside bank ac-