DUAL AGENCY FLAT RATE: INADEQUATE, INEFFICIENT AND LEGALLY SUSPECT

GOVERNMENT SACRIFICES THE NEEDS OF THE STATE'S MOST VULNERABLE POPULATION IN THE NAME OF ADMINISTRATIVE EASE AND COST-SAVINGS

J. BROOKE ALEXANDER*

For a moment, imagine you are "Mrs. Jones,"[1] nearly seventy years old, adopting your drug-addicted grandson who has severe medical, physical and developmental disabilities, which require twenty-four hour, around-the-clock, intensive care and supervision.

> "Robert Jones"[2] is three years old and is being adopted by his sixty-eight-year-old maternal grandmother, Mrs. Jones. Robert was born prematurely at twenty-four weeks and remained in the Neonatal Intensive Care Unit (NICU) for eleven months. His birth mother abused drugs and alcohol while she was pregnant with Robert, and she did not seek prenatal care. He was born addicted to methamphetamines and was turned over to the care of the State upon birth. Robert was diagnosed with chronic lung disease, has a tracheotomy tube and is fed through a G-tube. He had a cataract in his left eye that was corrected with surgery when he was two years old, and he has partial retina detachment in his right eye. He wears glasses. Robert suffers from asthma and sleep apnea. He has an alarm attached to his bed in order to alert Mrs. Jones when he stops breathing during the night, which happens at least four times a night. He

* Class of 2009, University of Southern California Gould School of Law; B.A. Psychology & B.A. Spanish 2003, Stanford University. I would like to thank University of Southern California Professor Heidi Rummel, Public Counsel Attorney Brian Capra and Public Counsel Attorney Karen Ullman for their invaluable insight and guidance throughout the research and writing of this Note as well as the staff and editors of the *Southern California Review of Law and Social Justice* for their hard work. I would also like to thank my family and friends for their support and encouragement.

[1] Name changed to maintain privacy. The narrative is based upon Author's personal experience working with Dual Agency families.

[2] Name changed to maintain privacy.

> is not yet walking or crawling and does not demonstrate any speech or language skills. Robert Jones is unable to participate in feeding or dressing himself. He is monitored regularly by a pediatrician, a pulmonary specialist, an ophthalmologist, a neurologist and a nephrologist, all located throughout the greater Los Angeles area. He has at least six doctor's appointments a week, and Mrs. Jones does not own a car. Robert takes nine different medications, some of which are administered intravenously.
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> Robert entered the foster care system upon birth due to his birth mother's drug abuse. He is also a Regional Center consumer due to his physical disabilities and developmental delays. This entitles Robert to a specialized rate under the Adoption Assistance Program.[3] Robert is entitled to receive the highest rate of $5159 per month due to his severe medical, physical and developmental disabilities and the level of skill and attention required to care for him. Luckily for Mrs. Jones, Robert entered the system prior to July of 2007, which entitled him to funding under the "old" sliding scale rate system that took into account each individual child's unique needs and familial circumstances.[4] Unfortunately, other similarly situated children who enter the foster care system after July of 2007 are no longer afforded the support necessary for their care and supervision. Today, if Robert was a Regional Center consumer and adopted from the California foster care system, he would receive a flat rate of $2006 per month with a discretionary supplement of *up to* $1000, essentially cutting his benefits in half.

Adoptive parents like Mrs. Jones will struggle to provide their children with adequate care and may be forced to place children like Robert in institutions where sufficient financial resources continue to be available.

The Governor's Budget 2007–08 approved the Dual Agency Rate Proposal, which caps Adoption Assistance Program (AAP) payments at a flat rate for children adopted out of the foster care system who are Regional Center consumers ("Dual Agency AAP children").[5] This Note will argue that the elimination of the previous four-level Alternative Residential Model (ARM) rate system and the creation of one standardized rate for all children with severe developmental disabilities may 1) violate federal and state regulations as well as case law, 2) prevent families from adopting and

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[3] *See infra* Part I.D (explaining the Adoption Assistance Program).

[4] *See infra* Part I.F (explaining the ARM rate system and how it was applied to Dual Agency children).

[5] *See* FIN. MGMT. & CONTRACT BRANCH, CAL. DEP'T SOC. SERVS., DUAL AGENCY RATE-SETTING METHODOLOGY, GOVERNOR'S BUDGET MAY REVISE 227, 227–30 (2007), *available at* http://www.cdss.ca.gov/cdssweb/entres/localassistanceest/May07/05EstimateMethodologies.pdf [hereinafter DUAL AGENCY RATE PROPOSAL].

force the most severely disabled children, like Robert Jones, into institutions and 3) be economically inefficient.

I. INTRODUCTION

A. CALIFORNIA'S FOSTER CARE SYSTEM

California's Child Welfare Services (CWS) system is responsible for protecting children who have been abused, abandoned or neglected in their home environment.[6] One in five of all CWS children nationwide are in the California system, making it the largest child welfare services system in the United States.[7] Foster care, the 24-hour-out-of-home care provided to children in need of temporary or long-term parenting because their parents are unable or unwilling to care for them, is the primary means of protecting these children.[8] In California, approximately 100,000 children are in foster care[9] and the system is designed to keep these children safe while services are provided to the family to achieve the ultimate goal of reunification.[10]

Children enter the foster care system based upon reports of abuse or neglect that are investigated by county social workers.[11] The Los Angeles County Department of Children and Family Services (DCFS) is the largest child welfare agency in the country, fielding over 160,000 emergency referrals a year.[12] In approximately a quarter of these referrals, the report is substantiated and a case is opened on the family.[13] Social workers then coordinate court-ordered family maintenance services, such as counseling,

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[6] *See* LISA K. FOSTER, FOSTER CARE FUNDAMENTALS: AN OVERVIEW OF CALIFORNIA'S FOSTER CARE SYSTEM 9 (Cal. Research Bureau, Cal. State Library 2001), *available at* http://www.library.ca.gov/crb/01/08/01-008.pdf; *see also* CAL. WELF. & INST. CODE § 300.2 (West 2008).

[7] FOSTER, *supra* note 6, at 10.

[8] *Id.* at 7.

[9] *Id.*

[10] *Id.* at 10; *see* CAL. WELF. & INST. CODE § 396 (West 2008); *see also id.* § 361.5 (requiring that court-ordered services are provided for a certain period of time to facilitate the safe return of the child to his or her family).

[11] *See* FOSTER, *supra* note 6, at 10.

[12] LITTLE HOOVER COMM'N, STILL IN OUR HANDS: A REVIEW OF EFFORTS TO REFORM FOSTER CARE IN CALIFORNIA 14 (2003), *available at* http://www.lhc.ca.gov/lhcdir/168/report168.pdf [hereinafter HOOVER, REFORM FOSTER CARE 2003]; *see, e.g.*, CTR. FOR SOC. SERVS. RESEARCH, UNIV. OF CAL. BERKELEY SCH. OF SOC. WELFARE, CHILD WELFARE DYNAMIC REPORT SYSTEM, http://cssr.berkeley.edu/ucb_childwelfare/default.aspx (follow "Referral & Substantiation Rates" hyperlink; then follow "SINGLE Time Period (California or Individual County)" hyperlink; then follow "Los Angeles" hyperlink) (last visited Mar. 22, 2008) [hereinafter DYNAMIC REPORT SYSTEM].

[13] FOSTER, *supra* note 6, at 2; *see* DYNAMIC REPORT SYSTEM, *supra* note 12.

parent training and respite care.[14] If parents complete the goals set forth in their service plan and the court finds that they can safely care for their child, then the case is closed.[15] However, in approximately 20% of the open cases in Los Angeles, parents are unable to meet their goals and the children are removed from the home and placed in foster care under the supervision of the Juvenile Court.[16]

The Juvenile Court is responsible for placing foster children in the least restrictive or most family-like environment that will meet their needs.[17] Approximately one-fifth of children removed from their home due to abuse, abandonment or neglect are initially placed in emergency shelters.[18] The purpose of such shelters is to provide temporary housing, lasting no more than thirty days, until the children are returned to their homes or placed in a setting that meets their needs.[19] In addition to emergency shelters, the five most common placements are relative's homes, family homes, small group homes, residential treatment settings and community treatment facilities.[20]

Federal law dictates a preference for placing a child in a home where someone directly related to the child assumes parenting responsibilities because it facilitates family reunification and promotes culturally sensitive environments.[21] If the child cannot be placed with a family member, the next best alternative is to place the child in a non-relative family home such as a foster family home or a home certified by a Foster Family Agency (FFA).[22] A foster family home is a licensed residential facility composed of foster parents and their own families, which provides 24-hour care for up to six children,[23] or up to eight children if it includes a sibling group.[24] To secure permission to operate a foster family home a family must undergo a licensing process that includes inspections of the home and interviews with family members residing in the home to ensure the requisite safety and

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[14] FOSTER, *supra* note 6, at 10; *see* CAL. WELF. & INST. CODE § 361.5(a)(3) (West 2008).

[15] FOSTER, *supra* note 6, at 10.

[16] *See, e.g.*, CAL. WELF. & INST. CODE § 306; FOSTER, *supra* note 6, at 10; *see also* DYNAMIC REPORT SYSTEM, *supra* note 12.

[17] *See* CAL. WELF. & INST. CODE § 396; FOSTER, *supra* note 6, at 20.

[18] FOSTER, *supra* note 6, at 20.

[19] *Id.*

[20] *Id.*

[21] 42 U.S.C. § 671(a)(19) (2006); *see* FOSTER, *supra* note 6, at 21.

[22] *See* FOSTER, *supra* note 6, at 22.

[23] *See, e.g.*, CAL. CODE REGS. tit. 22, §§ 80000–80059 (2008); CAL. HEALTH & SAFETY CODE § 1502(a)(5) (West 2008); FOSTER, *supra* note 6, at 22.

[24] CAL. HEALTH & SAFETY CODE § 1505.2 (eight children).

space requirements are met.[25] Foster family homes are similar in nature to certified homes, therefore allowing social workers to place children in FFA-certified homes when a foster family home is not available.[26] An FFA is a non-profit organization that recruits, certifies and trains foster parents and their family home for its exclusive use as a placement for foster children.[27] Most FFAs provide therapeutic treatment for children with emotional, behavioral, developmental or other special needs.[28] FFA-certified homes are the fastest growing placement option for foster children because they support children's developmental needs in a family-like environment.[29]

Unfortunately, some foster children are unable to benefit from a family-like environment because they require more structure and supervision.[30] These children are typically provided group care in group homes or residential and community treatment facilities.[31] In general, children placed in group care are over the age of twelve and demonstrate behavioral and emotional issues.[32] A group home is a licensed facility that provides 24-hour supervision in a structured environment.[33] Group homes that provide intensive therapeutic services are referred to as residential treatment facilities.[34] Similarly, a "community treatment facility" is a residential facility that provides mental health treatment services to children and has the capacity to provide containment if needed.[35] Group care is an extremely costly alternative to family and foster home placements for a state.[36] However, no one bears a greater cost than the children themselves.

In addition to dealing with the trauma of being removed from their homes, children must also cope with the likelihood that they will experience instability for several years in the foster care system.[37] Many children find themselves in and out of the system for an extended period of time even though foster care is intended only to be a short-term solution.[38] For

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[25] CAL. CODE REGS. tit. 22, §§ 80000–80059; *see* FOSTER, *supra* note 6, at 22.
[26] FOSTER, *supra* note 6, at 23.
[27] CAL. HEALTH & SAFETY CODE § 1502(a)(4); *see* FOSTER, *supra* note 6, at 23.
[28] FOSTER, *supra* note 6, at 23.
[29] *Id.* at 22–23.
[30] *Id.* at 24.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] CAL. HEALTH & SAFETY CODE § 1502(a)(8) (West 2008); *see* FOSTER, *supra* note 6, at 24.
[36] *See* HOOVER, REFORM FOSTER CARE 2003, *supra* note 12, at 3.
[37] FOSTER, *supra* note 6, at 25.
[38] *Id.*

example, in 2006, the children who were adopted out of the Los Angeles County DCFS had been in foster care for an average of 35.3 months.[39] In 2007, two-thirds of the children who had been in foster care for over twenty-four months experienced three or more placements.[40] In addition to being shuttled from home to home for several years, foster care children are not receiving needed health and educational services due to the instability they experience within a flawed system.[41] A quarter of foster care children wait three months or more for medical care and half of these children do not receive dental care or the appropriate mental health services.[42] Inadequate care of these children exacerbates their problems which, in turn, requires costlier resources to remedy the failures of the foster care system.[43]

B. FUNDING RESOURCES FOR CHILD WELFARE PROGRAMS

To cover the increased costs associated with the inadequate care provided to the state's foster care children, public child welfare agencies depend on a variety of federal funding streams such as Title IV-E (Federal Foster Care and Adoption Assistance),[44] Title IV-B (Subpart I—Child Welfare Services—and Subpart II—Promoting Safe and Stable Families)[45] and Title XIX (Medicaid),[46] among others.[47] These federal funds are passed through to the states and counties.[48] In California, over 80% of foster care children are eligible for, and receive, partial funding from the federal government to cover expenses related to their board and care and

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[39] DYNAMIC REPORT SYSTEM, *supra* note 12, (follow "C2.2 Median time to adoption (exit cohort)" hyperlink; then follow "Child Welfare" and "SINGLE Time Period (California or Individual County)" hyperlink; then follow "Los Angeles" and "Jan-Dec 2006" hyperlink) (last visited Mar. 22, 2008).

[40] *Id.* (follow "C4.1.2.3 Placement stability" hyperlink; then follow "at least 24 months (Measure C4.3)" hyperlink; then follow "Child Welfare" and "SINGLE Time Period (California or Individual County)" hyperlink; then follow "Los Angeles" and "Jan-Dec 2007" hyperlink) (last visited Mar. 22, 2008).

[41] HOOVER, REFORM FOSTER CARE 2003, *supra* note 12, at 3–4.

[42] *Id.*

[43] LITTLE HOOVER COMM'N, YOUNG HEARTS & MINDS: MAKING A COMMITMENT TO CHILDREN'S MENTAL HEALTH i (2001), *available at* http://www.lhc.ca.gov/lhcdir/161/report161.pdf.

[44] 42 U.S.C. §§ 670–679 (2006).

[45] *Id.* §§ 621–628b (Subpart I); 629–629i (Subpart II).

[46] *Id.* §§ 1396 to 1396w-1.

[47] *See* DONALD L. SCHMID, CHILD WELFARE LEAGUE OF AM., FUNDING RESOURCES FOR CHILD WELFARE (2003), http://www.cwla.org/advocacy/financingfunding.htm (describing the various funding resources for child welfare).

[48] DIANE F. REED & KATE KARPILOW, CAL. CTR. FOR RESEARCH ON WOMEN & FAMILIES, UNDERSTANDING THE CHILD WELFARE SYSTEM IN CALIFORNIA: A PRIMER FOR SERVICE PROVIDERS AND POLICYMAKERS 20 (2002), *available at* http://www.ccrwf.org/publications/ChildWelfarePrimer.pdf.

medical costs.[49] The amount that is not covered by the federal government is paid for by state and county funds.[50]

Title IV-E is a major funding source for foster children who have been placed in out-of-home care.[51] It is an open-ended entitlement program funded with a combination of federal and state matching funds.[52] Title IV-E reimburses states for foster care and adoption expenses that it has already paid, but the reimbursements are limited to expenses related to maintenance, administration and training.[53] The federal government reimburses the state (referred to as Federal Financial Participation (FFP)) between 50% and 83% for maintenance, which includes board and care payments made to licensed foster parents, foster homes and residential care facilities.[54] The FFP is 50% for administration, which consists of the activities necessary to administer the Title IV-E state plan.[55] The FFP for the training of those responsible for administering the plan is 75%.[56]

Additionally, Title IV-B includes a limited allocation of funds to each state for a variety of services designed to support families, reunify children or promote adoptions.[57] The Child Welfare Services program funds preventive intervention, alternative placement and reunification services.[58] The Promoting Safe and Stable Families program funds services related to family support, family preservation, time-limited family reunification, the promotion of adoptions and helping state courts improve administration of foster care and adoption proceedings.[59]

Medicaid[60] is an open-ended entitlement program that provides medical services to eligible children, which includes all Title IV-E eligible foster care and those adopted children with special needs.[61] These children often require additional care and Medicaid generally covers expenses re-

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[49] REED & KARPILOW, *supra* note 48.

[50] *Id.*

[51] 42 U.S.C. §§ 670–679 (2006); *see, e.g.*, SCHMID, *supra* note 47; REED & KARPILOW, *supra* note 48.

[52] 42 U.S.C. §§ 670–679;SCHMID, *supra* note 47.

[53] 42 U.S.C. §§ 670–679; SCHMID, *supra* note 47.

[54] *See* SCHMID, *supra* note 47.

[55] *See id.*.

[56] *See id.*

[57] 42 U.S.C. §§ 621–629i; *see* REED & KARPILOW, *supra* note 48.

[58] 42 U.S.C. §§ 621–629i ; *see* REED & KARPILOW, *supra* note 48.

[59] 42 U.S.C. § 629; *see* REED & KARPILOW, *supra* note 48.

[60] CMTY. OPERATIONS DIV., CAL. DEP'T OF DEVELOPMENTAL SERVS., THE HOME AND COMMUNITY-BASED WAIVER FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES (2004), *available at* http://www.dds.ca.gov/Publications/docs/HCBSBrochureRevised904.pdf [hereinafter DDS, HCBS BROCHURE] (Medicaid is referred to as "Medi-Cal" in California).

[61] 42 U.S.C. §§ 1396 to 1396w-1 (2006); SCHMID, *supra* note 47.

lated to hospital visits, pharmaceutical services, nursing homes and clinic services.[62] Medicaid also funds home and community-based services through federal waivers that allow certain targeted populations to live at home or in the community rather than in an institution.[63]

For example, Medicaid Home and Community-Based Services (HCBS) Waivers[64] afford states the flexibility to develop and implement creative community alternatives to placing Medicaid-eligible individuals in hospitals, nursing facilities or intermediate care facilities (ICF).[65] States may request waivers of certain federal requirements, such as statewideness,[66] comparability of services[67] and income rules,[68] to develop alternatives to placements in institutions.[69] To be eligible for the HCBS Waiver for the Developmentally Disabled (DDS Waiver), an individual must: 1) meet the Lanterman Act definition of developmental disability; 2) be an active regional center consumer; 3) have full-scope Medi-Cal benefits either through standard "community deeming" rules or through "institutional deeming;"[70] 4) have substantial limitations in his or her adaptive functioning which would qualify the individual for the level of care provided in an ICF for the developmentally disabled. The consumer's level of care needs are evaluated based upon his or her ability to perform activities of daily living and community participation; 5) not be concurrently enrolled in another HCBS Waiver; and, 6) choose to participate and receive services through the HCBS Waiver and to reside in a community setting.[71] Without this waiver, more children would be forced into institutions because families

[62] 42 U.S.C. §§ 1396 to 1396w-1; SCHMID, *supra* note 47.

[63] *See* SCHMID, *supra* note 47.

[64] 42 U.S.C. § 1396n(c)(1).

[65] DDS, HCBS BROCHURE, *supra* note 60.

[66] 42 U.S.C. § 1396a(a)(1) (allowing states to target waivers to particular areas of the state where the need is greatest).

[67] *Id.* § 1396a(a)(10)(B) (allowing states to make waiver services available to people at risk of institutionalization, without being required to make waiver services available to the Medicaid population at large).

[68] *Id.* § 1396a(a)(10)(C)(i) (allowing states to provide Medicaid to persons who would otherwise be eligible only in an institutional setting, often due to the income and resources of spouse or parent).

[69] *See* DDS, HCBS BROCHURE, *supra* note 60.

[70] *See id.* ("[I]nstitutional deeming" allows a person under the age of eighteen who meets the criteria of the HCBS Waiver to be determined as eligible for Medicaid regardless of his or her parent's or spouse's income and resources.).

[71] CMTY. OPERATIONS DIV., CAL. DEP'T OF DEVELOPMENTAL SERVS., THE HCBS WAIVER PRIMER AND POLICY MANUAL 8 (2008), *available at* http://www.dds.ca.gov/waiver/docs/WaiverManual2008.pdf [hereinafter DDS, HCBS MANUAL].

could not afford the cost of their care, ultimately costing the state a great deal more money.[72]

In California, the state and federal government share the cost of caring for foster and adopted children.[73] The budget for Child Welfare Services in California in 2007–08 was $4.1 billion.[74] However, billions more were spent on additional health care, mental health services, special education, substance abuse treatments and law enforcement.[75] Due to the exorbitant cost, policymakers have a real incentive to ensure that these children do not enter the foster care system to begin with and, if they do, that they secure permanent placement as soon as possible.[76]

Legislative reform aimed at reducing the foster care population, thereby reducing governmental costs, experienced an upturn beginning in the 1980s.[77] In 1980, Congress passed the Adoption Assistance and Child Welfare Act (AACWA)[78] in response to the ever-growing number of children entering the foster care system.[79] AACWA focused on family preservation and reunification, requiring that states use certain federal funds to provide rehabilitative services to the families, moving away from the goal of removing the child from any and all unsafe environments.[80]

However, the 1990s saw a return to an emphasis on child safety over family reunification, codified under the 1997 Adoption and Safe Families Act (ASFA).[81] ASFA established new procedural requirements and provided financial incentives to states to promote permanency planning and adoption.[82] Today, child welfare mandates hold public child welfare agencies accountable for the quality of care they provide as well as the effectiveness of the programs that have been implemented to address the foster

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[72] *See* REED & KARPILOW, *supra* note 48; *see also infra* Part IV (arguing flat rate system increases institutionalization of children with severe disabilities and institutional care will cost the state a great deal more).

[73] FOSTER, *supra* note 6, at 31.

[74] HEALTH & HUMAN SERVS., GOVERNOR ARNOLD SCHWARZENEGGER, 2007—08 GOVERNOR'S BUDGET 37, *available at* http://2007-08.archives.ebudget.ca.gov/pdf/Enacted/BudgetSummary/HealthandHumanServices.pdf [hereinafter HHS, GOVERNOR'S BUDGET].

[75] HOOVER, REFORM FOSTER CARE 2003, *supra* note 12, at 2.

[76] *See id.* at 3.

[77] FOSTER, *supra* note 6, at 35; *see* 42 U.S.C. §§ 621–629 (2006).

[78] *See* 42 U.S.C. §§ 621–624 (2006).

[79] FOSTER, *supra* note 6, at 42.

[80] *Id.* at 43; *see* 42 U.S.C. §§ 621–629.

[81] FOSTER, *supra* note 6, at 45; *see* Adoption & Safe Families Act (ASFA) of 1997, Pub. L. No. 105-89 (codified at 42 U.S.C. § 629).

[82] FOSTER, *supra* note 6, at 45; *see* 42 U.S.C. § 629 (Assemb. B. 2773, 1998 Leg., Reg. Sess. (Cal. 1998) (implementing ASFA in California)).

care crisis.[83] As a result, more and more foster care children are exiting the system and thriving under the stability of permanent placements, such as adoption.[84]

C. ADOPTING CHILDREN OUT OF CALIFORNIA'S FOSTER CARE SYSTEM

California uses a two-track concurrent planning process where social workers provide reunification services to the family while simultaneously establishing an alternative plan for a permanent living arrangement if reunification fails.[85] While 55% of children in the foster care system are reunified with their parents, those who cannot return home face three permanency options: adoption, guardianship and permanent placement in long-term foster care.[86] This Note will focus on the preferred option of adoption.[87] Adoption is a legal process that permanently transfers parental rights from the child's birth parents to the adoptive parents.[88]

The Los Angeles County DCFS assumes legal responsibility for the care, custody and control of the child once the court or the birth parents terminate parental rights.[89] After locating suitable prospective adoptive parents, the child's adoption social worker conducts an adoption home study.[90] The home study consists of interviews with the parents and other family members as well as inquiries into their health status, financial situation and employment history.[91] A "walk-through" of the house is required to ensure it meets health and safety standards.[92] All adults who will live in the home with the adopted child must receive criminal and child abuse clearances from the Department of Justice.[93] After the social worker compiles the information she has gathered from the home study into a written

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[83] FOSTER, *supra* note 6, at 37.

[84] *See* ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTIONS OF CHILDREN WITH PUBLIC CHILD WELFARE AGENCY INVOLVEMENT BY STATE FY 1995–FY 2006 (2008) (adoptions finalized increased from 4418 in FY 1998 to 7364 in FY 2006), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/adoptchild06.htm.

[85] FOSTER, *supra* note 6, at 27.

[86] *Id.*

[87] *Id.*

[88] DEP'T OF CHILDREN & FAMILY SERVS., ADOPTION HANDBOOK Introduction1 (2002), *available at* http://dcfs.co.la.ca.us/adoptions/Adopt_Handbook.html [hereinafter DCFS ADOPTION HANDBOOK].

[89] *See id.*; CAL. WELF. & INST. CODE §§ 300–304.7 (West 2008).

[90] *See* DCFS ADOPTION HANDBOOK, *supra* note 88, at ch. 2, 2; CAL. WELF. & INST. CODE § 366.26(n)(4) (West 2008).

[91] DCFS ADOPTION HANDBOOK, *supra* note 88, at ch. 2, 3.

[92] *Id.*; *see* CAL. WELF. & INST. CODE §§ 396–404.

[93] 42 U.S.C. § 671(a)(20)(C)(i) (2006); DCFS ADOPTION HANDBOOK, *supra* note 88, ch. 2, at 4. *See* CAL. WELF. & INST. CODE §§ 300–304.7.

assessment and it is approved by the supervising social worker, DCFS monitors the placement for at least six months before the court can finalize the adoption.[94]

During the post-placement supervision period, the prospective parents sign several forms, one of which is the Adoptive Placement Agreement.[95] The Agreement is a contract between the prospective parents and DCFS that outlines the parties' rights and responsibilities and sets forth the amount of benefits the family will receive.[96] The adoption is complete once the family attends a finalization hearing before a juvenile court judge who grants the Order of Adoption.[97] Parents who adopt children out of the foster care system face a challenging future due to the special needs of their child, and the federal government has responded by providing a variety of services as well as financial support to adoptive families.[98]

D. ADOPTION ASSISTANCE PROGRAM

Federal law uses financial incentives, administering monetary rewards to states that find adoptive homes for their foster care children, as a means of reducing the foster care population.[99] Foster care children may require additional medical, emotional and behavioral services as a result of the abuse or neglect they suffered at the hands of their birth parents.[100] Many parents adopting children out of the foster care system are low-income and are unable to cope with these extraordinary needs without financial support.[101] Thus, each state uses federal funds to compensate adopting families, enabling them to provide adequate care and supervision to their children.[102]

The Adoption Assistance Program (AAP) is a federally funded program that provides financial assistance to parents who adopt children with

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[94] DCFS ADOPTION HANDBOOK, *supra* note 88, at ch. 4, 1.

[95] *Id.* at ch. 4, 2.

[96] *Id.*

[97] *Id.* at ch. 5, 1.

[98] FOSTER, *supra* note 6, at 27. *See generally* 42 U.S.C. §§ 621–629i (providing services to support adoptive families); *id.* §§ 670-673(b) (providing states with federal funding in order to support adoptive families).

[99] FOSTER, *supra* note 6, at 27; *see* 42 U.S.C. §§ 670–673(b).

[100] FOSTER, *supra* note 6, at 13.

[101] *See* RESEARCH & DEV. DIV, CAL. DEP'T OF SOC. SERVS., CHARACTERISTICS OF AGENCY ADOPTIONS IN CALIFORNIA 6 (2003, *available at* http://www.dss.cahwnet.gov/research/res/pdf/Childreport/AdoptCHAR/CharAgencyAdoptions00_01.pdf) [hereinafter DSS, CHAR 2000].

[102] CAL. WELF. & INST. CODE § 16115.5 (West 2008).

"special needs."[103] "Special needs" refers to the factors that increase the likelihood that children will not achieve permanency due to an inability to find an adoptive family capable of caring for their extraordinary needs.[104] These factors include: age three or older; membership of a sibling group; membership of a minority group by virtue of race, ethnicity, color or language; physical, mental or emotional disability; or adverse parental background.[105] In Los Angeles County, all court-dependent children meet the criteria of a child with special needs by virtue of their history of abuse, neglect or abandonment, and they are eligible to receive AAP benefits.[106] Adopted children are eligible for AAP payments until they reach the age of eighteen or twenty-one if a physical or mental handicap exists that warrants the continuation of assistance.[107]

In general, the AAP payment amount is determined through an agreement between the adoptive parents and the state agency administering the program.[108] The AAP payment, distributed monthly, is a negotiated amount based upon the "needs" of the child and the "circumstances of the family," which includes the family's ability to incorporate the child into the household in relation to their lifestyle, standard of living and future plans.[109] The level of care and supervision that the child requires is assessed by the adoption social worker through direct observation of the child, information regarding the child's birth history and psychological or medical background, information provided by the adoptive parents, and whether they received a special rate while in foster care.[110] Based upon the assessment, the child may be eligible to receive a specialized care rate that is higher than the basic AAP amount.[111]

Children usually qualify for a specialized care rate if they have a documented physical or mental/emotional condition at the time of adoptive placement.[112] In Los Angeles County, the specialized care rates are classi-

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103 42 U.S.C. §§ 670, 673(a)–(b).

104 E.g., 42 USC § 673(c); Foster *supra* note 8 at 27; *see* CAL. WELF. & INST. CODE § 16120(a)(1)–(2) (outlining the requisite barriers the child must possess to be eligible for AAP benefits in California).

105 CAL. WELF. & INST. CODE § 16120(a)(1)–(2).

106 *E.g.*, *id.* § 16120(c)(2)(A); DCFS ADOPTION HANDBOOK, *supra* note 88, ch. 6, at 2.

107 CAL. CODE REGS. tit. 22, § 35333(a)(1)(d) (2008).

108 *See* 42 U.S.C. § 673(a)(3); *see also* CAL. WELF. & INST. CODE § 16118(a) (the state agency administering the program in Los Angeles, California is the Department of Children and Family Services).

109 42 U.S.C. § 673(a)(3); *see* CAL. WELF. & INST. CODE § 16119(d)(2) (defining "circumstances of the family").

110 CAL. CODE REGS. tit. 22, § 35333.

111 DCFS ADOPTION HANDBOOK, *supra* note 88, ch. 6, at 3 (amounts vary by county).

112 *Id.*

fied into "F rates" (four levels, F1 to F4) for children with severe physical and medical impairments and a "D rate" for children with severe emotional and behavioral problems.[113] Prior to the change in the law, if a child was also a Regional Center consumer, he or she was entitled to receive an even higher specialized care rate known as the "ARM rate."[114]

E. REGIONAL CENTERS

Regional Centers, non-profit private corporations, are fixed points of contact in the community for persons with developmental disabilities and their families.[115] Twenty-one California Regional Centers contract with the California Department of Developmental Services (CDDS) to provide services for individuals with developmental disabilities.[116] Regional Centers provide diagnostic services, treatment and therapy, preventive services, case management services, information and referrals, adaptive equipment and family support systems.[117] Services are implemented according to an Individual Program Plan (IPP) that the Regional Center consumers and their service coordinators develop.[118] IPPs include an individual's goals and objectives, a schedule of the type and amount of services and support they will receive, and a date to review the individual's progress.[119] The Plan is designed to promote community integration and facilitate normal, independent and productive lives.[120]

To be eligible for Regional Center services, individuals must meet certain criteria.[121] An individual age three years or older qualifies for Regional Center support if the individual has a developmental disability, which includes mental retardation,[122] autism,[123] cerebral palsy,[124] epilep-

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[113] *Id.*

[114] *See* CAL. CODE REGS. tit. 22, § 35333(c)(1)(C).

[115] CAL. WELF. & INST. CODE § 4620 (West 2008).

[116] *Id.* (authorizing CDDS to contract with Regional Centers); *Id.* § 4621 (allowing CDSS to establish Regional Centers through non-profit corporations); DEP'T OF DEVELOPMENTAL SERVS., STATE OF CALIFORNIA, DIRECTORY OF REGIONAL CENTERS, *available at* http://www.dds.ca.gov/RC/RCList.cfm (last visited Nov.18, 2008) (listing the contact information for the twenty-one California Regional Centers). *See generally* CAL. WELF. & INST. CODE §§ 4620–4669.75 (establishing Regional Centers for persons with developmental disabilities and outlining the rights and responsibilities of the Regional Centers).

[117] CAL. WELF. & INST. CODE §§ 4640–4659.

[118] *Id.* §§ 4501, 4646.

[119] *Id.*

[120] *Id.*

[121] CAL. WELF. & INST. CODE § 4512(a) (defining the requisite criteria).

[122] *See id*; *see also* INFO. SERVS. DIV., CAL. DEP'T OF DEVELOPMENTAL SERVS., FACT BOOK 15 (9th ed. 2007), *available at* http://www.dds.ca.gov/FactsStats/docs/factbook_9th.pdf [hereinafter DDS FACT BOOK] (defining mental retardation as a condition that "is characterized by significant limitations

sy[125] or a condition similar to mental retardation or one that requires treatment similar to mental retardation.[126] Additionally, the disability must originate prior to the age of eighteen, be expected to continue indefinitely and constitute a substantial handicap where the individual demonstrates significant limitations in three or more areas of major life activity.[127] Regional Centers also provide Early Intervention Services to infants and toddlers under the age of three who have delays in cognitive, motor, communication, social or emotional, or adaptive development.[128] An infant or toddler may also be eligible for services if they are at risk of becoming developmentally disabled due to having a condition known to have harmful consequences or because of biomedical risk factors such as prenatal exposure to drugs or alcohol.[129] In California, Regional Centers work with DCFS, the Department of Social Services (CDSS) and CDDS to provide services to Regional Center consumers who are or were under the care of the state.[130]

F. DUAL AGENCY CHILDREN AND BENEFITS

"Dual Agency" children are those who are Regional Center consumers and receive either Aid to Families with Dependent Children—Foster Care

both in intellectual functioning (i.e., an IQ of approximately 70 or below) and in adaptive behavior as expressed in conceptual, social and practical adaptive skills.").

[123] *See* CAL. WELF. & INST. CODE § 4512(a); *see also* DDS FACT BOOK, *supra* note 122 (defining autism as "a neurodevelopmental disorder" with multiple causes or origins. It is a syndrome that causes "gross and sustained impairment in social interaction and communication with restricted and stereotyped patterns of behavior, interests, and activities that appear prior to the age of three.").

[124] *See* CAL. WELF. & INST. CODE § 4512(a); s*ee also* DDS FACT BOOK, *supra* note 122 (defining cerebral palsy as including "two types of motor dysfunction: (1) nonprogressive lesion or disorder in the brain occurring during intrauterine life or the perinatal period and characterized by paralysis, spasticity, or abnormal control of movement or posture which is manifest prior to two or three years of age, and (2) other significant motor dysfunction appearing prior to age 18.").

[125] *See* CAL. WELF. & INST. CODE § 4512(a); *see also* DDS FACT BOOK, *supra* note 122 (defining epilepsy as "recurrent, unprovoked seizures" that "can cause loss of muscle control, tremors, loss of consciousness and other symptoms.").

[126] *See* CAL. WELF. & INST. CODE § 4512(a); *see also* CAL. DEP'T OF DEVELOPMENTAL SERVS., INFO. ABOUT DEVELOPMENTAL DISABILITIES, http://www.dds.cahwnet.gov/general/info_about_dd.cfm (last visited Mar. 22, 2008) (encompassing handicapping conditions that involve brain damage or dysfunction including intracranial neoplasms, degenerative brain disease or brain damage associated with accidents, for example).

[127] CAL. WELF. & INST. CODE §§ 4512(a), 4512(*l*)(1) (defining areas of major life activity to include receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living and economic self-sufficiency); CAL. CODE REGS. tit. 17, § 54001 (2008).

[128] CAL. GOV. CODE § 95014(a)(1)–(3) (West 2008).

[129] *Id.*; CAL. CODE REGS. tit. 17, § 52022.

[130] CAL. WELF. & INST. CODE §§ 4640–4659.

(AFDC-FC)[131] or Adoption Assistance Program (AAP) benefits.[132] These children have special needs that require care and supervision beyond that typically provided to children in foster care.[133] Rather than place these children in institutions, the law has recognized a developmentally disabled child's "right to treatment and rehabilitation services and supports in the least restrictive environment."[134] The Lanterman Developmental Disabilities Services Act (Lanterman Act) was enacted "to prevent the dislocation of persons with developmental disabilities from their home communities" and "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age."[135] To implement the Lanterman Act in California prior to July 1, 2007, CDSS and Regional Centers used the Alternative Residential Model (ARM) rating system in place for Community Care Facilities (CCF)[136] to determine the enhanced rate to be paid to Dual Agency AAP children residing with their adoptive parents.[137]

The ARM is a rating scale set by CDDS reflecting the rate at which a licensed CCF would be reimbursed for providing care to a Regional Center consumer.[138] The levels of care are determined according to the type of facility and the amount of care and supervision the individual needs.[139] The level of care determinations correspond to a monthly monetary amount ranging from approximately $900 to $5100.[140]

The level of care determinations are divided incrementally from Level 1 to Level 4, where Level 4 is divided again into nine sublevels (Level 4A to 4I).[141] An individual placed in a Level 1 or a Level 2 CCF requires little care and supervision.[142] A CCF designated as a Level 3 houses individuals

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[131] *See id.* §§ 11400–11410 (authorizing aid for needy children in foster care as defined under this division).

[132] SUBCOMM. NO. 1 ON HEALTH & HUMAN SERVS., ASSEMBLY BUDGET COMM., DISCUSSION ISSUE 2: ESTABLISH FIXED RATE FOR DUAL AGENCY CHILDREN 62 (2007), *available at* http://www.assembly.ca.gov [hereinafter SUBCOMM., FIXED RATE].

[133] FOSTER, *supra* note 6, at 27.

[134] CAL. WELF. & INST. CODE § 4502(a).

[135] *Id.* § 4501.

[136] CAL. HEALTH & SAFETY CODE § 1502(a) (West 2008).

[137] CAL. WELF. & INST. CODE § 11464 (West 2005) (requiring DSS use the residential facility rates established by DDS, codified at CAL. WELF. & INST. CODE §§ 4680–4684, to determine rates to be paid for 24-hour out-of-home care of Dual Agency children).

[138] CAL. CODE REGS. tit. 22, § 35333(c)(1)(C) (2008). *See generally* CAL CODE REGS tit. 17, §§ 56902-56937 (2008) (outlining the rate-setting procedures).

[139] CAL. CODE REGS. tit. 17, § 56004 (2008).

[140] *See id.* (rates *available at* http://www.dds.ca.gov/Rates/docs/CCF_rates.pdf).

[141] *Id.*

[142] *Id.* § 56004(c)(2)(A).

who have significant deficits in self-help skills, some limitations in physical coordination and mobility and who may exhibit some disruptive or self-injurious behaviors.[143] The staff to client ratio in a Level 3 CCF is usually one staff member for every three consumers.[144] An individual who requires Level 4 care has severe deficits in self-help skills, severe impairment in physical coordination and mobility and demonstrates severely disruptive or self-injurious behaviors.[145] The staff to client ratio in a CCF rated as a Level 4A to 4B is one to three, a Level 4C to 4E is one to two and the ratio for a Level 4F to 4I rated facility is one staff member for every consumer.[146]

To make a level of care determination for Dual Agency children eligible for AAP benefits prior to July 1, 2007,[147] Regional Center workers were faced with a hypothetical question: "[I]f the child had to be placed in a group residential facility, instead of her adoptive home, what service level facility would the child require?"[148] In theory, Regional Centers were charged with the task of drawing upon all of the available information related to the child's specific condition, assessing his or her needs and then generating an "ARM rate letter" that specified the child's level of care determination.[149] The ARM rate letters were then to be used by DCFS to administer the benefits to the families.[150] Unfortunately, Regional Centers were inconsistent in following these guidelines, and many families were caught in the middle of bureaucratic infighting.[151]

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[143] *Id.* § 56013(c).

[144] *Id.* § 56004(c)(2)(B).

[145] *Id.* § 56013(d).

[146] *Id.* § 56004(c)(2)(B)–(D).

[147] 2007-SB No. 84 Cal. Adv. Legis. Serv. 177 (Deering) (changing the laws regarding Dual Agency children after July 1, 2007, pursuant to Senate Bill 84 (2007)).

[148] Anna P. v. Harbor Reg'l Ctr., OAH No. L 2005080958, at 8 (Cal. Office of Admin. Hearings Nov. 6, 2006), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2005080958.084.pdf.

[149] Letter from Marjorie Kelly, Deputy Dir., Children & Family Div., Cal. Dep't of Soc. Servs., to All County Welfare Dirs. & All County Prob. Officers, All County Letter No. 98-28, at 4–5 (May 4, 1998), *available at* http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl98/98-28.PDF.

[150] *See* Kelly, *supra* note 149, at 5.

[151] *See, e.g.*, Mikquail D. v. N. L.A. County Reg'l Ctr., OAH No. L 2005070954, at 9, 11 (Cal. Office of Admin. Hearings Oct. 11, 2005), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2005070954"; then follow "BEFORE THE" hyperlink) ("The controversy over the issuance of rate letters is based on an inter-agency dispute concerning whether a regional center must assess a consumer and make an ARM rate determination because of language contained in a DSS regulation. . . . Caught in the middle of the controversy is the Service Agency's own client."); Jacob G. v. Inland Reg'l Ctr., OAH No. L 2004060464, at 7–8 (Cal. Office of Admin. Hearings Feb. 1, 2005), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2004060464.084.pdf; Destiny S. v. Harbor Reg'l Ctr., OAH No. L 2007010738, at 2–3 (Cal. Office of Admin. Hearings Mar. 20, 2007), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2007010738.084.pdf.

ARM rate letters have caused a great deal of conflict among CDSS, Regional Centers, DCFS and AAP parents because Regional Centers argue that CDSS has no legal authority to compel them to write the letters.[152] Relying on this argument, the seven Regional Centers in Los Angeles County informed DCFS that they would no longer provide ARM rate letters for AAP purposes.[153] As a result of the inter-agency conflict, Dual Agency AAP families initiated fair hearings to contest that they were either not getting ARM rate letters at all or to address the Regional Center's faulty assessment of their child's needs and familial circumstances.[154] The battle between Dual Agency adoptive families and Regional Centers continued unresolved for a few years and ultimately culminated in a class-action lawsuit seeking to compel Regional Centers to issue ARM rate letters so that needy families could receive their monthly payments.[155] In December of 2005, the parties reached an interim agreement, whereby Regional Centers agreed to issue ARM rate letters pending resolution of the litigation.[156] In the meantime, Regional Centers, CDSS and CDDS convened to devise a solution to their conflicting administrative policies.[157]

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[152] *See id.*; *see, e.g.*, SUBCOMM., FIXED RATE, *supra* note 132; *Anna P.*, OAH No. L 2005080958, at 2 (arguing that it was DCFS's responsibility to certify eligibility and to determine amount of financial assistance under CAL. WELF. & INST. CODE § 16118(a)); Courtney W. v. Harbor Reg'l Ctr., OAH No. L 2006040514, at 4, 7 (Cal. Office of Admin. Hearings Aug. 14, 2006) (discussing the argument in Ass'n of Reg'l Ctr. Agencies (ARCA) v. Bolton, No. BS 091175 (L.A. Super. Ct. May 17, 2004) that DSS had no authority over Regional Centers and that CAL. CODE REGS. tit. 22, § 35333(c)(1)(C) was void), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2006040514"; then follow "BEFORE THE" hyperlink).

[153] Edward F. v. Harbor Reg'l Ctr., JCCP No. 4439, at 6 (L.A. Super. Ct. Oct. 4, 2006) (seeking to compel Regional Centers to begin issuing ARM rate letter again); *see also Anna P.,* OAH No. L 2005080958, at 3.

[154] *See, e.g.*, *Anna P.,* OAH No. L 2005080958, at 3 (refusing to provide ARM rate letter); *Destiny S.*, OAH No. L 2007010738, at 2 (conducting an improper assessment of claimant's level of need); *Jacob G.*, OAH No. L 2004060464, at 6–7, 15 (determining level of care without reviewing assessments and reports regarding claimant's condition).

[155] *See Edward F.*, JCCP No. 4439, at 10–11; *see also Anna P.,* OAH No. L 2005080958, at 3.

[156] *See Edward F.*, JCCP No. 4439, at 10-11; *see also Anna P.,* OAH No. L 2005080958, at 3.

[157] *See* Letter from Frank Mecca, Exec. Dir., Cal. Welf. Dirs. Ass'n (CWDA) & Robert Baldo, Exec. Dir., Ass'n of Reg'l Ctr. Agencies (ARCA), to Cliff Allenby, Dir., Cal. Dep't of Soc. Servs. (CDSS) (Mar. 15, 2006) (on file with authors).

II. A FLAWED DUAL AGENCY RATE PROPOSAL

A. SUGGESTED A FLAT RATE FOR ALL DUAL AGENCY CHILDREN REGARDLESS OF INDIVIDUAL NEEDS AND CIRCUMSTANCES

In September of 2005, CDSS and CDDS solicited input from Regional Centers and certain county child welfare agencies to address issues regarding level of care determinations for Dual Agency children.[158] The California Welfare Directors Association (CWDA) and the Association of Regional Center Agencies, Inc. (ARCA) responded with a proposal that focused on the rates paid to foster care providers for Regional Center consumers and receiving AFDC-FC funding.[159] The CWDA and ARCA recognized that this subset of AFDC-FC population was not being paid a CDDS ARM rate if the foster home was not vendored.[160] Finding it unfair to require that these foster families go through the purely administrative exercise of becoming vendored to be eligible to receive the funds necessary to care for these disabled children, the CWDA and ARCA introduced a proposal that would pay a higher flat rate to non-vendored foster homes housing a Dual Agency child.[161] The CWDA and ARCA cited a preference for placing children in a home-like setting to justify increasing the benefits for AFDC-FC families.[162] They also proposed, in a brief remark, that Dual Agency AAP children receive the same flat rate.[163] While implementation of a flat rate for Dual Agency AFDC-FC children may be more logical than the system that was in place at the time, the CWDA and ARCA failed to justify cutting thousands of dollars needed to care for Dual Agency AAP children and eliminating the incentive for parents to adopt.[164]

In May of 2007, CDSS and CDDS presented a new proposal in the May Revise to the California Governor's Budget, purporting to "clarify"

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[158] *Id.* at 1.

[159] *Id.* at 2–5; *see* Jasmine B. v. County of Los Angeles, No. B200788, at 2 (Cal. Ct. App. 2008) (CWDA and ARCA introduced their proposal in light of the court's holding that the language of the statutory and regulatory scheme governing developmentally disabled foster children and policy considerations underlying that scheme require that the facilities into which developmentally disabled foster children are placed be vendorized in order to receive additional rates under the ARM rate system.), *available at* http://courtinfo.ca.gov/opinions/documents/B200788.DOC.

[160] *Id.* at 1–2; *see* DDS, HCBS MANUAL, *supra* note 71 ch. 5, at 22 (defining vendorization as the approval process that enables an individual or agency to provide services to people with developmental disabilities funded through a regional center); CAL. CODE REGS. tit. 17, § 54310 (2008) (outlining the vendor application requirements).

[161] Mecca & Baldo, *supra* note 157, at 2–5.

[162] *Id.* at 1.

[163] *Id.* at 2.

[164] *See id.*

the rate structure for Dual Agency AFDC-FC and AAP children based upon an over-simplified solution that was generated without adequate input from all interested parties.[165] The May Revision proposal capped the AFDC-FC and AAP payment amount at $2006 per month for Dual Agency children three years of age and older and $898 per month for Dual Agency children under the age of three.[166] The proposal stipulated that families currently receiving an amount below the flat rate would be increased to $2006 and those receiving a higher rate than the proposed grant would continue to receive their previously established rate.[167] The flat rates were intended solely for board and care, and the proposal asserted that Regional Centers would "continue" to be responsible for purchasing services and supports for the families.[168] Many questions were left unanswered by the proposal, including why a proposal initially designed for the sole benefit of AFDC-FC families was now applicable to Dual Agency AAP families.[169]

B. RELIED UPON UNSUPPORTED DATA, ASSUMPTIONS AND METHODOLOGY TO PROJECT COST SAVINGS

CDSS presented a list of statistics upon which its proposal was based, but it is unclear as to how it generated its data and projections.[170] At the time the proposal was presented, CDSS estimated that there were 3138 foster care children receiving AFDC-FC funding where 1210 children were under the age of three and 1928 were age three or over.[171] It estimated that there were 2498 adopted children receiving AAP funding and, of these, 629 were under three years of age and 1869 were age three or older.[172] CDSS estimated that the average payment to both AFDC-FC and AAP families was $1087 per month.[173]

To justify its cost-savings projections, CDSS relied on the theory that 3814 Dual Agency children phased in over an eighteen-month period would be paid the maximum amount of $5159, representing a Level 4I

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[165] DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227.

[166] *Id.* ($2006 reflects the Level 3 ARM rate in 2006 and $898 corresponds to the Level 1 ARM rate in 2006. It is important to note that the 2007 proposal did not even reflect the 2007 ARM rate amounts current at the time).

[167] *Id.*.

[168] *Id.*.

[169] *See* SUBCOMM., FIXED RATE, *supra* note 132, at 64; DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227.

[170] DUAL AGENCY RATE PROPOSAL, *supra* note 165, at 227.

[171] *Id.*

[172] *Id.*

[173] *Id.*

ARM rate under the old rating system.[174] To contain these perceived costs, for 2007–08, CDSS projected that 558 Dual Agency children, entitled only to the average amount of $1087, would enter the system and receive the flat rate of $2006 and 63 new Dual Agency children would qualify for a higher rate.[175] Based on these unsubstantiated figures, the proposal estimated a cost avoidance of $25,000,000 in 2007–08 and an additional $130,000,000 in 2008–09.[176] However, CDSS never explained how 63 new Dual Agency children could possibly generate a total cost avoidance that was five times greater than the prior year.[177]

C. SHIFTED INCREASED COST TO REGIONAL CENTERS, WHICH HAVE HAD HISTORY OF MISMANAGING FUNDS

The Dual Agency flat rate proposal also created a cost shift to the Regional Centers for services and supports.[178] Some families would have to request additional respite and behavioral services from Regional Centers because the flat rate was intended only for board and care.[179] CDDS presented an additional proposal of how it intended to fund the fiscal impact the flat rate proposal would have on Regional Centers.[180] The numbers upon which CDDS relied included: 5636 Dual Agency children currently receiving payments, 493 of whom were receiving monthly payments above the proposed $2006 and were "typically at the Community Care Facility Level 4I rate of $5159 per month," and an estimated 68 new Dual Agency children (48 foster care children and 20 AAP children) who would enter the system each year.[181]

CDDS went on to estimate that 75% of the foster care enrollees (36 children) would need sixteen hours of respite care per month costing $16.66 per hour and 75% of the AAP enrollees (15 children) would require the same plus an additional 50% of AAP children (10 children) would need eight hours of behavioral services per month at $36.09 per hour.[182] Based on these figures, the cost to Regional Centers to provide services and sup-

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[174] *Id.* at 228.

[175] *Id.*

[176] SUBCOMM., FIXED RATE, *supra* note 132.

[177] DUAL AGENCY RATE PROPOSAL, *supra* note 165, at 228.

[178] *See* CAL. DEP'T OF DEVELOPMENTAL SERVS., REG'L CTRS. LOCAL ASSISTANCE ESTIMATE, GOVERNOR'S BUDGET 2007-08 MAY REVISION E15.1–E15.4 (2007), *available at* http://www.dds.cahwnet.gov/budget/Docs/0708MayRevision_RC.pdf [hereinafter DDS, PURCHASE OF SERVS.].

[179] *See id.* at E15.1.

[180] *See id.*

[181] *See id.* at E15.1–E15.2.

[182] *Id.* at E15.3.

port to these children would be $107,000.[183] The proposed sources of funding included: $74,000 from the General Fund,[184] $33,000 from the General Fund Match, $41,000 from the General Fund Other, $33,000 from Reimbursements[185] and $33,000 from the HCBS Waiver.[186]

However, it is unlikely that Regional Centers will be able to make up for the dramatic decrease in funding caused by the elimination of the ARM rate system for most Dual Agency families because Regional Centers are known for exercising inadequate fiscal control over purchases of some services and, as a result, the State Government is hesitant to fund the increased costs.[187] Regional Center purchase of services[188] expenditures have increased dramatically over the years, from $649,982,136 in 1994 up to an astounding $2,193,197,453 in 2004.[189] While caseload growth accounts for some of the expenditures, Regional Centers have been unable to provide consistent data regarding the cause for increased utilization and cost of services.[190] For example, in 2004–05, behavior intervention training cost the state $17,200,000, where one Regional Center alone accounted for $10,000,000 of that total, another sixteen Regional Centers justified the remaining $7,200,000 and four Regional Centers did not report any expenditure under this code.[191] The fact that one Regional Center is over-utilizing this service and some are not it at all raises concerns regarding a

[183] *Id.* at E15.4.

[184] *Id.*; *see* CAL. DEP'T OF FIN., FINANCE GLOSSARY OF ACCOUNTING & BUDGETING TERMS, http://www.dof.ca.gov/fisa/bag/DofGlossFrm.htm (last visited Mar. 22, 2008) [hereinafter FINANCE GLOSSARY] (defining General Fund as "the predominant fund for financing state government programs, used to account for revenues which are not specifically designated to be accounted for by any other fund. The primary sources of revenue for the General Fund are the personal income tax, sales tax, and bank and corporation taxes.").

[185] DDS PURCHASE OF SERVS., *supra* note 178, at E15.4; *see* FINANCE GLOSSARY, *supra* note 182 (defining reimbursements as "[a]n amount received as a payment for the cost of services performed, or of other expenditures made for, or on behalf of, another entity . . . . Reimbursements represent the recovery of an expenditure.").

[186] DDS PURCHASE OF SERVS., *supra* note 178, at E15.4; s*ee supra* notes 64-72 (HCBS Waiver requirements).

[187] HEALTH & SOC. SERVS., LEGISLATIVE ANALYST'S OFFICE (LAO), DEP'T OF DEVELOPMENTAL SERVS. C154 (2006), *available at* http://www.lao.ca.gov/analysis_2006/health_ss/healthss_anl06.pdf [hereinafter LAO ANALYSIS 2006].

[188] LAO ANALYSIS 2006, *supra* note 187, at C157–58 (defining "purchase of services" to include those services related to day programs, community care facilities, support services, transportation, in-home respite, habilitation services, health care, out-of-home respite and medical facilities that Regional Centers purchase directly from vendors).

[189] DDS FACT BOOK, *supra* note 122, at 21.

[190] LAO ANALYSIS 2006, *supra* note 187, at C165–67.

[191] *Id.* at C160.

client's ability to access services and the quality of care they are receiving.[192]

The Legislative Analyst's Office recommended that CDDS audit Regional Centers' reporting of purchase of services because better fiscal control allows for more accurate budget projections and more informed policy decisions.[193] Unfortunately, CDDS has not yet conducted the audit[194] and, as a result, the state lacks the information necessary to make policy decisions regarding rate-setting and the funding of programs related to Dual Agency children.[195] Nevertheless, the flat rate proposal encourages the state to make this uninformed decision and administer greater funding to an already precarious system.[196] Based on past patterns of spending behavior, it is improbable that the Regional Centers will be capable of meeting the Dual Agency AAP families' needs resulting from the implementation of a flat rate system.

D. UNANSWERED QUESTIONS REMAIN

In reviewing the proposals presented by CDSS, the Assembly Budget Committee posed three questions that need clarification in order to proceed with changing the laws regarding Dual Agency children:

> 1. Please describe the May Revision proposal.
>
> 2. What is your response to questions regarding the legality of the proposal and what did your legal analysis conclude?
>
> 3. Why did the Administration wait until the May Revision to introduce this proposal?[197]

CDSS never provided a response.

E. UNTIMELY PRESENTATION OF PROPOSAL TO LEGISLATURE

It is important to note that not only was the proposal based on faulty assumptions and inflated figures, but that CDSS presented the flat rate

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[192] *See id.* at C168–69 (explaining that the wide variation in spending could be due to the notion that some Regional Center clients are not being provided with behavior services at all (access to care concern) or that the services offered are inadequate and so families are choosing to forego using them (quality of care concern)).

[193] *Id.* at C163–64.

[194] HEALTH & SOC. SERVS., LEGISLATIVE ANALYST'S OFFICE (LAO), DEVELOPMENTAL SERVS. C78–79 (2008), *available at* http://www.lao.ca.gov/analysis_2008/health_ss/healthss_anl08.pdf.

[195] LAO ANALYSIS 2006, *supra* note 187, at C163–64.

[196] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 165, at 228; DDS PURCHASE OF SERVS., *supra* note 178, at E15.4.

[197] SUBCOMM., FIXED RATE, *supra* note 132, at 64.

scheme in the May 2007 Revision to the Budget which left no time for input from outside sources.[198] The Governor's Budget is the result of a long process that begins more than a year before the Budget becomes law.[199] In January, a proposed budget for the upcoming fiscal year is presented and public discussions are held.[200] In February, legislative analysts review the Budget and provide recommendations for changes and, again, public discussions are held.[201] In mid-May, known as the "May Revision," the Budget is updated based on the latest economic forecast and a Final Budget is prepared for approval.[202] The Budget Act authorizes the Budget in late June and the official Budget is usually signed in August.[203] CDSS presented the Dual Agency Rate proposal in the May 2007 Revision after the opportunity for public discussions had passed.[204]

Presenting the proposal in the May Revision was unfair because it entailed a significant change to current policy and should have been discussed through the policy and budget processes.[205] The Subcommittee analyzing the proposal conceded that advocacy organizations were rightly concerned about the timing of the policy because it put the Legislature in a difficult position of "either adopt[ing] the proposal with virtually no review and public discussion or fac[ing] large fiscal consequences."[206] It was never revealed why CDSS presented the new policy in May, nor were the "large fiscal consequences" ever verified. The families were not given an opportunity to communicate the impact this drastic change would have on their lives. The manner in which the agencies passed the proposal through the legislature suggests that they were attempting to prevent a critical analysis of their data.[207] Had their proposal been presented in January and given the proper scrutiny, it is highly unlikely that it would have passed.

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[198] DUAL AGENCY RATE PROPOSAL, *supra* note 165; *see* SUBCOMM., FIXED RATE, *supra* note 132, at 63.

[199] *See* DEP'T OF FIN., BUDGET PROCESS OVERVIEW, http://www.dof.ca.gov/fisa/bag/documents/budgetprocessoverview.pdf [hereinafter DOF, BUDGET PROCESS OVERVIEW]; *see also* LEGISLATIVE COUNSEL, STATE OF CAL., A GUIDE FOR ACCESSING CALIFORNIA LEGISLATIVE INFORMATION ON THE INTERNET (2001), http://www.leginfo.ca.gov/guide.html (follow "Appendix A: Overview of the Legislative Process" hyperlink).

[200] *See* DOF, BUDGET PROCESS OVERVIEW, *supra* note 199.

[201] *Id*.

[202] *Id*.

[203] *Id*.

[204] DUAL AGENCY RATE PROPOSAL, *supra* note 165; *see* SUBCOMM., FIXED RATE, *supra* note 132, at 63.

[205] *See* SUBCOMM., FIXED RATE, *supra* note 132, at 63.

[206] *Id.*

[207] *See id.*

III. BILL PASSED BASED UPON FAULTY DUAL AGENCY FLAT RATE PROPOSAL

The Governor approved the Budget on August 24, 2007.[208] Senate Bill 84 revised the rate system for AFDC-FC and AAP children who are also Regional Center consumers with the following changes:

> 1. Establishes a flat rate of $2006 per month for children over three years of age paid by the county for care and supervision. Children under the age of 3 are also entitled to $2006 per month if it is established that they have a developmental disability as defined by the Lanterman Act.
>
> 2. Establishes a flat rate of $898 for children under the age of three paid by the county for care and supervision.
>
> 3. Requires that families receiving rates lower than $2006 or $898 as of July 1, 2007 to be increased to $2006 or $898.
>
> 4. Requires that families receiving rates higher than $2006 or $898 as of July 1, 2007 remain the same unless there is a change in the child's circumstances.
>
> 5. Requires that families with pending requests for an ARM rate as of July 1, 2007, receive an ARM rate from the Regional Centers.
>
> 6. Allows counties, at their sole discretion, to authorize a supplement of up to $1000 for a child over the age of 3 if the child is determined to require extraordinary care and supervision that cannot be met with the flat rate.
>
> 7. Requires CDSS to announce within 120 days specifying the criteria for receipt of the supplement.
>
> a. Objective criteria to be taken into account in making a determination include the extent to which a child has:
>
> i. severe impairment in physical coordination and mobility;
>
> ii. severe deficits in self-help skills;
>
> iii. severely disruptive or self-injurious behavior; and
>
> iv. a severe medical condition.
>
> 8. Requires Regional Centers to separately purchase or secure services found in the child's IPP or IFSP.
>
> 9. Requires CDSS and CDDS to collect and report specific data to Legislature to assess the affect of the changes.
>
> 10. Establishes that licensed and vendored foster care placements are still entitled to the ARM rate.[209]

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208 2007-SB No. 84 Cal. Adv. Legis. Serv. 177 (Deering).

Thus, Senate Bill 84 approves changes to existing law that will have harmful effects on Dual Agency children. Moreover, the bill uses flawed rationales to justify changes in the law.[210]

IV. FLAWED RATIONALES USED TO JUSTIFY CHANGES IN THE LAW

A. IMPLEMENTATION OF FLAT RATE DOES NOT GENERATE SUBSTANTIAL COST AVOIDANCE

CDSS presented a cost analysis in their Dual Agency Rate Proposal, first introduced in May of 2007 and later revised in November of 2007, that is misleading because the figures upon which the calculations are based are incomplete, overstated and contradictory.[211] As a result, the Legislature could not have made an informed decision when it approved Senate Bill 84.

1. Incomplete Data Does Not Allow for Accurate Calculation of Increased Costs

First, the increased costs that CDSS presented are inaccurate because the data provided to calculate a total is incomplete.[212] CDSS estimated that implementation of the flat rate would cost the government an additional $22,103,000 for foster care children and $21,092,000 for AAP children.[213] To generate these increased costs for a given year, one would need to know: (1) how many current clients are receiving less than the flat rate and will see their payments increase with the implementation of the new laws, (2) how many of those clients are over the age of three and how many are under the age of three, (3) how many new clients that would have received payments below the flat rate will enter the system in the upcoming year and (4) how many of those new clients are over the age of three and how many are under three years old.

However, the proposal only set forth a formula for calculating the increased cost per child per year and generalized statistics regarding the total number of children in the system. CDSS based the increased costs on the total casemonths (18) multiplied by the difference between the proposed

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[209] *Id.*; *see* CAL. WELF. & INST. CODE §§ 4684, 11464, 16121 (West 2008).

[210] *See infra* Part IV.

[211] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 165, at 227–30; *see also* DDS, PURCHASE OF SERVS., *supra* note 178, at E15.1–E15.4.

[212] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227–30.

[213] *Id.* at 229–30.

payment of $2006 for children over the age of three ($898 for children under the age of three) and the current average AAP payment of $1087 ($425 for children under the age of three).[214] CDSS stipulated that there were 3797 Dual Agency children above the age of three and 1839 below the age of three in the system at the time.[215] CDSS projected that an estimated 462 Dual Agency foster care children and ninety-six Dual Agency AAP children entitled to receive $2006 would enter the system in the upcoming year and that an additional forty-eight foster care children and fifteen AAP children would be entitled to a higher rate.[216]

The incomplete information undermines CDSS's argument that the implementation of a flat rate will not create a significant negative financial impact because it is impossible to apply the given statistics to the formula to generate the aforementioned increased costs. CDSS failed to draw a distinction as to the age of the children as well as the number of children currently receiving payments below the flat rate, so one cannot ascertain how many children would have their payments increased to $2006 (or $898 for children under the age of three).[217] Based on these incomplete figures, one can only legitimately assert that the government will expend an additional $16,542 per child over the age of three[218] and $8514 per child under the age of three[219] under the flat rate system.[220] CDSS would need to provide us with more specific information to follow their calculations.

While CDSS attempted to reconcile its incomplete calculations with the age-specific estimates included in the revised proposal (November of 2007), the increased costs generated by the application of the new statistics directly contradict the figures upon which CDSS based its original May 2007 proposal. In the revised proposal, CDSS asserts that 1691 Dual Agency foster care children over three years of age, 1158 Dual Agency foster care children under the age of three, 1613 Dual Agency AAP children over the age of three and 582 Dual Agency AAP children under the age of three are currently receiving a payment less than the proposed flat rates of

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[214] *Id.* at 228.

[215] *Id.* at 227.

[216] *Id.* at 228.

[217] *Id.* at 227.

[218] *Id.* (calculating $16,542 = 18 casemonths x [$2006 flat rate–$1087 average]); *see* CAL. WELF. & INST. CODE § 11464(c) (West 2008) (establishing flat rate of $2006).

[219] DUAL AGENCY RATE PROPOSAL, *supra* note 5165, at 227 (calculating $8514 = 18 casemonths x [$898 flat rate–$425 average]); *see* CAL. WELF. & INST. CODE § 11464(d) (West 2008) (establishing flat rate of $898 for children under the age of 3).

[220] *See* CAL. WELF. & INST. CODE §§ 4684, 11464, 16121 (codifying flat rate system).

$2006 and $898.[221] Again, CDSS projects that 462 Dual Agency foster care children and ninety-six Dual Agency AAP children will enter the system in the upcoming year and receive the proposed flat rate of $2006.[222] Applying the new age-specific statistics to the given formula, the increased costs for Dual Agency foster care children are $45,474,138 [223] and $33,225,426 for Dual Agency AAP children,[224] substantially higher than the estimated $22,103,000 (foster care) and $21,092,000 (AAP) increased costs included in the original proposal.[225] The inconsistent estimates indicate that the implementation of a flat rate system will have a significantly greater negative financial impact than CDSS led the Legislature to believe.

2. Overstated Cost Avoidance Estimates Are Misleading

Secondly, the cost-avoidance projections are misleading because the numbers are inflated.[226] CDSS estimated that the implementation of a flat rate would avoid costs of $37,624,000 for Dual Agency foster care children and $30,537,000 for Dual Agency AAP children.[227] As to evaluate the total amount of savings expected with the implementation of a flat rate system, one would need to know how many new Dual Agency children would have received the highest rate of $5159 in the upcoming year. It would also be helpful to know how the supplement will be distributed under the new law to ascertain the amount that new Dual Agency children, ones who would have been assigned the highest level of care under the old system, will receive.

Again, CDSS's proposal is not specific as to the average payment amount that children at the highest level of care determination receive, and CDSS instead overstates that *all* of these children receive the highest possi-

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[221] FIN. MGMT. & CONTRACT BRANCH, CAL. DEP'T SOC. SERVS., DUAL AGENCY RATE-SETTING METHODOLOGY, GOVERNOR'S BUDGET NOVEMBER SUBVENTION 218 (2007), *available at* http://www.dss.cahwnet.gov/cdssweb/entres/localassistanceest/2008/05_Estimate_Methodologies.pdf.

[222] *Id.*

[223] *See supra* notes 218-219 (calculating $45,474,138 = [$16,542 (increased cost per child over the age of three) x 1691 (foster care children over the age of three)] + [$8514 (increased cost per child under the age of three) x 1158 (foster care children under the age of three)] + [$16,542 (increased cost per child over the age of three) x 462 (new foster care children over the age of three expected to enter the system)]).

[224] *See supra* notes 218-219 (calculating $33,225,426 = [$16,542 (increased cost per child over the age of three) x 1613 (AAP children over the age of three)] + [$8514 (increased cost per child under the age of three) x 582 (AAP children under the age of three)] + [$16,542 (increased cost per child over the age of three) x 96 (new AAP children over the age of three expected to enter the system)].

[225] DUAL AGENCY RATE PROPOSAL, *supra* note 165, at 229–30.

[226] *Id.* at 227–30.

[227] *Id.* at 230.

ble amount of $5159.[228] Like the increased costs calculations, CDSS estimates how much the government will save per child in a given year with the implementation of the flat rate based upon multiplying the casemonths (18) by the difference between the current average of $1087 and the Level 4I rate of $5159.[229] CDSS suggests that an astounding 3814 Dual Agency children, specifically 2105 Dual Agency foster care children and 1709 Dual Agency AAP children, will enter the system in the next eighteen months and all of them would have actually begun receiving $5159.[230]

However, CDSS's overstated estimates are misleading because they are based on the assumption that Regional Centers were actually making Level 4I rate determinations prior to the implementation of the flat rate system.[231] To say that a total of 3814 Dual Agency children would have begun receiving $5159 under the old system suggests that approximately 67.6% of the children have the most severe disabilities.[232] If Regional Centers had demonstrated a pattern of assessing these children properly and had actually made Level 4I determinations, then CDSS's cost avoidance estimates would be more convincing.[233] The trend indicates, however, that prior to implementation of the new flat rate system, Regional Centers had a policy of only making Level 1–3 rate determinations, meaning that no child would receive more than $2006.[234] Some of the families who received inadequate assessments, estimated by CDSS to be approximately ten families per year,[235] initiated fair hearings and some saw their level of care determinations increased.[236] Nevertheless, even assuming that *all* of the families who initiated fair hearings saw their rates increased to $5159, it is impossible to reach the cost avoidance CDSS projected.[237] While it may be plausible that a large percentage of Dual Agency children have severe disabilities,[238] it is unlikely that they were *all* receiving $5159 under the old

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[228] *Id.* at 228.

[229] *Id.*

[230] *Id.*

[231] *Id.*; *see* DDS PURCHASE OF SERVS., *supra* note 178, at E15.2.

[232] DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227 (calculating 3814 Dual Agency children phased in over eighteen months (2105 FC + 1709 AAP) out of 5636 total Dual Agency children (3138 FC + 1210 AAP) would receive $5159 = 67.6%).

[233] *See infra* cases cited note 262; DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 229–30.

[234] *See infra* cases cited note 262.

[235] DDS, PURCHASE OF SERVS., *supra* note 178, at E15.3.

[236] *See infra* cases cited note 262.

[237] DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 229–30.

[238] *See* DEP'T OF DEVELOPMENTAL SERVS., STATE OF CALIFORNIA, CLIENT CHARACTERISTICS STATEWIDE (June 2007), http://www.dds.ca.gov/FactsStats/docs/June07_QRTCOTB.pdf (Table 1); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES (CALIFORNIA) 5 (2003) (indicating that 13,213 foster children who had developmental disabilities ex-

system. Thus, the analysis CDSS presented to calculate cost avoidance is misleading because it is based on faulty assumptions.

3. Contradictory Figures Presented in CDSS Dual Agency Rate Proposal and CDDS Purchase of Services Proposal Undermine Cost Savings Argument

Finally, the numbers CDSS and CDDS presented in their proposals undermine the effectiveness of the cost avoidance argument because those numbers contradict one another.[239] According to CDSS, implementation of a flat rate for the estimated 3814 Dual Agency foster care and AAP children phased-in over eighteen months who would have received $5159, will generate substantial cost-savings.[240] On the other hand, CDDS's Regional Center purchase of services analysis asserts that only an average of sixty-eight new Dual Agency foster care and AAP children enter the system each year.[241] CDDS's estimates regarding new Dual Agency children undermines CDSS's cost savings analysis because it is not possible to avoid costs of $25,000,000 in budget year 2007–08 and an additional $130,000,000 in budget year 2008–09[242] with only sixty-eight children entering the system each year.

4. Statistics Included in Recently Released Report Reveal Legislature Was Misled by Estimates Included in CDSS's and CDDS's Proposals

First, it is important to note that in conducting my initial research of the demographic profile of the Dual Agency population, the majority of the California Regional Centers as well as representatives of CDSS and CDDS claimed, "No agency keeps track of that sort of aggregate information."[243] A Los Angeles County DCFS Social Worker summed up the unrealistic na-

ited the system that year and of those children, 24.6% (3250 children) were adopted. Assuming that all of the children are Regional Center clients by virtue of their developmental disabilities, then this number is close to the numbers presented by CDSS),
http://www.acf.hhs.gov/programs/cb/pubs/cwo03/state_data/california.htm.

[239] *Compare* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227–30 *with* DDS, PURCHASE OF SERVS., *supra* note 178, at E15.1–E15.4.

[240] DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 228.

[241] DDS, PURCHASE OF SERVS., *supra* note 178, at E15.2–E15.4.

[242] DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227; *see* SUBCOMM., FIXED RATE, *supra* note 132.

[243] *See, e.g.*, Telephone interview with Service Coordinator, E. L.A. Reg'l Ctr. (Mar. 18, 2008); Telephone interview with Data Request Operator, Dep't of Developmental Servs. (Mar. 18, 2008); Email from Debbie Williams, Chief of Child Welfare Data Analysis Bureau, Cal. Dep't of Soc. Servs., to Brooke Alexander, Student, USC Gould School of Law (Mar. 21, 2008, 01:28:00 PST) (indicating that CDSS and CDDS was in the process of generating a report with more specific statistical information that would be released in late April) (on file with author).

ture of the figures CDSS relied upon in their proposal by stating, "In order to generate such specific numbers regarding the Dual Agency AAP kids and the amount of their benefits, someone who has all the time in the world would have to go through every single adopted child's DCFS file, which is like over 50,000, to count how many are also Regional Center consumers and how much they are receiving in AAP benefits. It is a very archaic system we are working under."[244] Despite this lack of confidence in the maintenance of the Dual Agency data files, CDSS and CDDS released the "Report to the Joint Legislative Budget Committee: Data to Facilitate Legislative Review of the Outcomes of the Dual Agency Program and payment Changes," which includes data for all Dual Agency foster care and AAP children.[245]

Pursuant to the reporting requirements of the new law,[246] the Report reveals that the Dual Agency Rate Proposal cost analysis is fatally flawed because the actual numbers suggest that implementation of the new law will have a negative financial impact. The new law requires CDSS and CDDS to provide, on a semiannual basis, data to the Joint Legislative Budget Committee that includes the number of, and services provided to, Dual Agency children, separated according to their age and the rate they are receiving; the number and nature of appeals filed; the number of children adopted before and after the effective date of the new law, broken out by age and rate; and the number and levels of supplements requested, authorized, denied and appealed.[247] The Report findings highlight the most significant flaws in the Dual Agency Rate Proposal, including the actual number of children receiving an amount less than the flat rate, estimates regarding the number of children expected to enter the system in the next year as well as the average amount children receive who qualify for a level of care determination above the flat rate.[248]

CDSS significantly underestimated the increased costs because the actual statistics indicate that the majority of Dual Agency children currently receive less than the flat rate and will have their monthly payments in-

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[244] Telephone interview with Adoptions Social Worker Supervisor, L.A. County Dep't of Child. & Fam. Servs., in L.A., Cal. (Mar. 18, 2008).

[245] *See* CAL. DEP'T OF SOC. SERVS. & CAL. DEP'T OF DEVELOPMENTAL SERVS., HHS391 REPORT TO THE JOINT LEGISLATIVE BUDGET COMMITTEES: DATA TO FACILITATE LEGISLATIVE REVIEW OF THE OUTCOMES OF THE DUAL AGENCY PROGRAM AND PAYMENT CHANGES (Feb. 2008) (on file with author) [hereinafter HHS391 REPORT]; *see also* Williams, *supra* note 243.

[246] CAL. WELF. & INST. CODE § 11464(h) (West 2008).

[247] *Id.* § 11464(h)(2).

[248] *See* HHS391 REPORT *supra* note 245, at 10–12.

creased with the implementation of the new law.[249] For example, CDSS's proposed increased costs of $21,092,000 for the estimated 2500 Dual Agency AAP children suggests that only half of the population receives less than the flat rate.[250] However, actual baseline data shows that there are approximately 2200 Dual Agency AAP children and of those, roughly three-fourths receive payments below the $2006 and $898 rates.[251] CDSS's proposal is flawed not only because the estimated number of children and the corresponding total increased cost asserted do not add up, but also because the increased cost associated with the implementation of the new law is much higher than what CDSS suggested in its proposal.

The Report also shows that CDSS significantly inflated the projected cost-avoidance because although the actual figures indicate a small percentage of children currently receive payments above the new flat rate, the average amount is substantially less than the $5159 which CDSS based its projections and a much smaller number of children will enter the system in a given year.[252] CDSS claimed savings of $25,000,000 in the first year and an unfounded increase to $130,000,000 in the next year based on its estimates that those receiving rates above the flat rate receive $5159 and an estimated 3814 Dual Agency foster care and AAP children (67.6% of the Dual Agency population) would enter the system at the highest rate over the next year.[253] However, baseline data indicates that only one-tenth of Dual Agency foster care children and one-fourth of Dual Agency AAP children receive an amount higher than the flat rate, not more than half of the population as CDSS claimed.[254] The actual average amount for foster care children under the age of three is $2620,[255] foster care children over the age of three is $3512,[256] AAP children under the age of three is $1623[257] and AAP children over the age of three is $3558,[258] not the $5159 CDSS used to support their cost avoidance analysis.

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[249] *See id.*

[250] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227–28 (calculating 51% = $21,092,000 increased cost for total population / $16,542 increased cost per child = 1275 AAP children receiving less than flat rate / 2500 total AAP population).

[251] *See* HHS391 REPORT *supra* note 245, at 3.

[252] *See id.* at 10–12.

[253] *See* SUBCOMM., FIXED RATE, *supra* note 132; s*ee also supra* note 232 (calculating 67.6%).

[254] *See* HHS391 REPORT *supra* note 245, at 3.

[255] *Id.* at 10.

[256] *Id.*

[257] *Id.* at 12.

[258] *Id.*

The Report also reveals that only 250 Dual Agency AAP children entered the system over a six-month period.[259] Assuming a trend, one can project that 750 Dual Agency AAP children will enter the system in the next eighteen months[260] and even if one were to assume that *all* of those children would have been entitled to receive the highest rate, it is still significantly less than the 1709 Dual Agency AAP children CDSS suggested in its proposal. Thus, the actual number of children in the system, the number of children expected to enter the system in the upcoming year and the average amounts the children actually receive reveal that the cost avoidance associated with the implementation of the new flat rate system is insignificant.

In sum, the cost savings analysis presented by CDSS is fatally flawed, and yet it was the driving force behind the push to have the new flat rate system pass through the Legislature. The numbers that CDSS presented contradict the cost savings argument. The question that needs to be asked and answered is one of purpose: should the law be constructed so that the state saves money, or does the law exist to provide for the needs of the state's most vulnerable children?

B. FLAT RATE AND SCALED SUPPLEMENT PROVISION WILL NOT DECREASE LITIGATION

One of the stated purposes of the proposal was to reduce the amount of litigation surrounding the ARM rate system.[261] However, the new flat rate structure will not decrease litigation because the Regional Center has already demonstrated a pattern of ineffectual implementation of policy.[262] CDSS's proposal operates on the assumption that Dual Agency parents were initiating fair hearings under the ARM rate system because they

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[259] *Id.* at 3.

[260] *See id.* (calculating 750 new AAP children = 250 AAP children / 6 months = 41.6 AAP children per month x 18 months (year)).

[261] *See* SUBCOMM., FIXED RATE, *supra* note 132, at 63.

[262] *See id.* at 62; *see, e.g.*, Russell M. v. Harbor Reg'l Ctr., OAH No. L2006030159, at 4 (Cal. Office of Admin. Hearings May 4, 2006) (Regional Center refusing to assign a level of care determination higher than a Level 3), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2006030159"; then follow "BEFORE THE" hyperlink); Courtney W. v. Harbor Reg'l Ctr., OAH No. L 2006040514, at 7 (Cal. Office of Admin. Hearings Aug. 14, 2006) (Regional Center basing determination on the fact that child is being cared for at home instead of evaluating child's individual needs), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2006040514"; then follow "BEFORE THE" hyperlink); Anna P. v. Harbor Reg'l Ctr., OAH No. L 2005080958, at 2, 7 (Cal. Office of Admin. Hearings Nov. 6, 2006) (Regional Center failing to conduct a particularized analysis), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2005080958.084.pdf.

wanted a higher rate.[263] However, the actual problem involved rating determinations made by the Regional Center that were based on uninformed and faulty assessments as well as the misapplication of the ARM rate scale's qualifying characteristics to a severely disabled child's conditions.[264] Regional Centers were making level of care determinations regardless of the child's needs.[265]

For example, in *Jacob G. v. Inland Regional Center*,[266] the Dual Agency child is blind, has to be constantly redirected not to remove his prosthetic eyes, has mental retardation, suffers from hearing loss, throws tantrums several times daily, requires constant one–on-one supervision to avoid serious personal injury, cannot feed or dress himself and requires hand over hand assistance to complete tasks.[267] The Regional Center rated Jacob at an ARM Level 2, which is for children with minimal to significant deficits in behavior, self-help, and mobility.[268] Jacob's low-income adoptive parents initiated a fair hearing for a new level of care determination because the evidence related to his disabilities mandated a higher level of care according to the ARM rating scale.[269]

Jacob's parents argued that the assessment and subsequent level of care determination were faulty because the Regional Center worker did not consult the reports and evaluations pertinent to Jacob's needs.[270] The Regional Center caseworker did not confer with other therapists involved in the child's care, review his IPP[271] or his Client Development Evaluation

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[263] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 5 at 227. *But see, e.g.*, *Anna P.*, OAH No. L 2005080958, at 2 (arguing assessment should be particularized analysis of child's needs); Jacob G. v. Inland Reg'l Ctr., OAH No. L 2004060464, at 6–7, 15 (Cal. Office of Admin. Hearings Feb. 1, 2005) (claiming that Regional Center did not review documents relevant to child's condition when making level of care determination), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2004060464.084.pdf; Mikquail D. v. N. L.A. County Reg'l Ctr., OAH No. L 2005070954, at 4, 11 (Cal. Office of Admin. Hearings Oct. 11, 2005) (claiming that Regional Center refused to provide an ARM rate letter at all), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2005070954"; then follow "BEFORE THE" hyperlink).

[264] *See, e.g.*, cases cited *supra* notes 154, 262–63.

[265] *See, e.g.*, cases cited *supra* note 262; Destiny S. v. Harbor Reg'l Ctr., OAH No. L 2007010738, at 2 (Cal. Office of Admin. Hearings Mar. 20, 2007), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2007010738.084.pdf.

[266] OAH No. L 2004060464 (Cal. Office of Admin. Hearings Feb. 1, 2005).

[267] *Id.* at 6, 9–13.

[268] *Id.* at 6–7.

[269] *Id.* at 8.

[270] *Id.* at 6.

[271] *Id.* at 6, 11–12 (ignoring evidence in Jacob's IPP that detailed his medical needs as well as the fact that he required constant supervision and monitoring, hand over hand assistance to complete tasks,

Report (CDER),[272] nor consult any state or federal regulation or Regional Center guidelines.[273] She reached her conclusion based upon a cursory referral form from a co-worker who only observes the child once every two months for, on average, less than two hours per visit.[274]

In addition, Jacob's parents disputed the level of care determination because the Regional Center considered extraneous factors that were not applicable to Jacob's case.[275] The assessor rationalized her evaluation by stating that any rate above a Level 3 was not applicable because costs associated with the operation of a residential community facility do not exist in caring for someone in a family home.[276] She made her determination based on placement and not based upon Jacob's individual needs.[277] The court concluded that Jacob could not be safely cared for at a Level 2 or Level 3 facility due to inadequate staff to consumer ratios and determined he was entitled to a Level 4-A rate.[278] Thus, this case, and others like it, demonstrate that the impetus behind the ARM rate litigation was not a dispute over payment amounts, but rather the Regional Centers' inability to implement the policy of making a level of care determination based on each child's needs.[279]

Furthermore, the implementation of a flat rate may not decrease litigation because the scaled ARM rate system is similar to the new supplement provision, so disputes over level of care determinations may continue.[280] Title 17, section 56013(c)–(d) of the California Code of Regulations and newly enacted section 11464 of the California Welfare and Institutions Code both reference the necessity of considering the severity of the child's

assistance with dressing and hygiene and that Jacob demonstrated continuing daily temper tantrums that were difficult to control).

[272] *Id.* at 6, 11 (failing to review Jacob's CDER, which indicated that he was mentally retarded, totally blind, he needed support to ambulate, he had inadequate bladder and bowel control, he demonstrated violent and aggressive episodes and he was resistive); *see* HEALTH & WELF. AGENCY, CAL. DEP'T OF SOC. SERVS., CLIENT DEVELOPMENT EVALUATION REPORT (CDER) MANUAL I.1 (1986), *available at* http://www.dds.ca.gov/FactsStats/docs/CDER_manualBM.pdf (defining the CDER as an assessment instrument CDDS uses to "(1) collect data on client diagnostic characteristics and (2) measure and evaluate on an ongoing basis the functioning levels of persons with developmental disabilities who receive services in the California developmental disabilities services system").

[273] *Jacob G.*, OAH No. L 2004060464, at 6.

[274] *Id.* at 9.

[275] *Id.* at 8.

[276] *Id.* at 6–8.

[277] *Id.*

[278] *Id.* at 15–16.

[279] *Id.*; *see, e.g.*, cases cited *supra* notes 262–63.

[280] CAL. WELF. & INST. CODE § 11464(c)(2)(A) (West 2008) (authorizing supplement of *up to* $1000 for children who need extraordinary care and supervision) (emphasis added).

impairments in physical coordination and mobility, deficits in self-help skills or disruptive or self-injurious behaviors when making a determination.[281] The ARM rates are divided according to the severity of the individual's deficits and the new supplement provision suggests a similar scaled system.[282] For example, section 11464(c)(2)(A) of the California Welfare and Institutions Code states:

> The County, at its sole discretion, may authorize a supplement of up to one thousand dollars to the rate for children three years of age and older, if it determines the child has the need for extraordinary care and supervision that cannot be met within the rate established pursuant to paragraph (1).[283]

The new law charges CDSS, CDDS, Regional Centers and other child welfare agencies with the task of developing the criteria to be used to determine the "level of the supplements."[284] Basically, the new supplement provision creates a multi-tiered system similar to the ARM rate system, but on a smaller scale. Thus, if the responsible agency continues to demonstrate difficulty implementing policy as the Regional Center did under the ARM rate system, parents may continue to initiate fair hearings to dispute their level of supplement determination and the increased litigation may continue.

C. SHIFTING RESPONSIBILITY TO A DIFFERENT AGENCY DOES NOT PROVIDE CLARITY IN THE RATE SETTING PROCESS AND ROLES OF COUNTY WELFARE DEPARTMENTS AND REGIONAL CENTERS

The new laws do not clarify the rate setting process or the roles of the responding agencies because those concerns were never at issue in the first place.[285] In reality, the Regional Center's "confusion" prior to the implementation of the flat rate was the result of their inability and unwillingness to administer the program and inter-agency conflict.[286] Regional Centers

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[281] *Id.* (taking into consideration severity of deficits when making level of supplement determination); CAL. CODE REGS. tit. 17, § 56013(c)–(d) (2008) (requiring that services provided take into account severity of child's deficits).

[282] *Compare* CAL. WELF. & INST. CODE § 11464(c)(2)(A), *with* CAL. CODE REGS. tit. 17, § 56013(c)–(d). Interview with Brian Capra, Staff Att'y, Pub. Counsel, in L.A., Cal. (Oct. 16, 2008) (indicating that the supplement will be a spectrum depending on the combination and/or severity of the recipient's condition(s). It consists of four levels and will range from $250, $500, $750 up to $1000).

[283] CAL. WELF. & INST. CODE § 11464(c)(2)(A).

[284] *Id.*

[285] SUBCOMM., FIXED RATE, *supra* note 132, at 62–63.

[286] *See* SUBCOMM., FIXED RATE, *supra* note 132, at 62–63; *see, e.g.*, Mikquail D. v. N. L.A. County Reg'l Ctr., OAH No. L 2005070954, at 9 (Cal. Office of Admin. Hearings Oct. 11, 2005) (inter-agency conflict), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm

were making level of care determinations for consumers without consulting the child's records, relevant evaluations of the child's condition or from other providers involved in the child's care.[287] As a result, parents initiated fair hearings to compel Regional Center's to make a proper assessment of their child's needs.[288] Unable to effectively manage the process, the Regional Centers stopped providing ARM rate letters altogether, citing administrative burden and legal consequences.[289] Regional Centers claimed to be confused as to their role and the role of CDSS, CDDS and DCFS in making level of care determinations.[290]

However, in *Edward F. v. Harbor Regional Center*,[291] the Judge clarified any confusion by specifically highlighting Title 22, section 35333(c)(1)(C) of the California Code of Regulations as the basis for a Regional Center's duty to make a level of care determination.[292] The provision indicates that Dual Agency children shall receive a "foster family home rate formally determined for the child *by the Regional Center* using the facility rates established by the California Department of Developmental Services."[293] Once again, Regional Centers reluctantly began issuing ARM rate letters.[294] However, instead of assessing the needs of each individual child, Regional Centers began to arbitrarily issue Level 4I ARM rate letters regardless of a child's need.[295] A note in the Executive Committee Meeting Minutes of the North Los Angeles County Regional Center summed up the attitude of Regional Centers:

> After a long court battle, a judge finally issued a ruling, but it wasn't in our favor. The regional center will now be required to issue rate letters to families who adopt children with developmental disabilities. And if we don't give them the highest rate, the families will appeal. As such, [a staff member] has told staff to provide these families with the 4I rate

(search "2005070954"; then follow "BEFORE THE" hyperlink); cases cited *supra* notes 153, 159, 235 (inability to administer program).

[287] *See, e.g.*, cases cited *supra* notes 262–63.

[288] *Id.*

[289] Edward F. v. Harbor Reg'l Ctr., JCCP No. 4439 (L.A. Super. Ct. Oct. 4, 2006).

[290] *Id.* at 19–20; *see* SUBCOMM., FIXED RATE, *supra* note 132, at 62–63.

[291] JCCP No. 4439 (L.A. Super. Ct. Oct. 4, 2006).

[292] *Id.* at 13–22, 24; *see* Anna P. v. Harbor Reg'l Ctr., OAH No. L 2005080958, at 8 (Cal. Office of Admin. Hearings Nov. 6, 2006), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2005080958.084.pdf.

[293] CAL. CODE REGS. tit. 22, § 35333(c)(1)(C) (2008) (emphasis added).

[294] *See, e.g.*, cases cited *supra* note 292

[295] *See* Minutes from the N. L.A. Reg'l Ctr. (NLARC) Exec. Comm. Meeting 4 (Oct. 25, 2006) (on file with author) [hereinafter Minutes NLARC]; *see* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227.

> which is approximately $5,000 per month (tax free), per adopted child.[296]

This suggests that the confusion was not related to the rate process and the role of Regional Centers, but rather an inability and unwillingness to effectively, consistently and fairly administer funding.

Thus, while the law today holds the Counties and not the Regional Centers responsible for determining Dual Agency benefits, it does not ensure that these agencies will properly do their jobs. The nation's most vulnerable children will suffer in the name of administrative ease and interagency peace.

D. THE SCALED SUPPLEMENT PROVISION MAY UNDERMINE THE ARGUMENT FOR STATEWIDE CONSISTENCY

The inconsistent implementation of the ARM rate system may not be resolved by the new flat rate because the supplement provision calls for a similar scaled system and similar issues may arise.[297] Section 11464 of the California Welfare and Institutions Code offers a supplement of "up to one thousand dollars" authorized at the "sole discretion" of the County, which will take into account "objective criteria" to determine eligibility and "level of the supplements."[298] All of the responsible agencies and the Dual Agency families are supposed to convene to establish the "objective criteria" within 120 days of the implementation of the Bill.[299] To date, the objective criteria has not yet been released.[300] Questions remain: How can there be consistency without protocol in place? What is happening to the families in the meantime? If each county employee is allowed to use their discretion in authorizing a supplement, how is consistency ensured?

Additionally, the problems associated with the application of a scaled system to a child with severe disabilities remain unresolved because Regional Centers were unable and seemingly unwilling to make consistent level of care determinations for Dual Agency children, even with objective criteria in place under the old ARM rate system.[301] Nothing has changed

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[296] *See* Minutes NLARC, *supra* note 295.

[297] *See* discussion *supra* Part V; *see also* CAL. WELF. & INST. CODE § 11464 (West 2008); CAL. CODE REGS. tit. 17, § 56013 (2008).

[298] CAL. WELF. & INST. CODE § 11464.

[299] *Id.* § 11464(c)(2)(A) (meeting should have taken place by January of 2008).

[300] 2007-SB No. 84 Cal. Adv. Legis. Serv. 177 (Deering).

[301] *See, e.g.*, Russell M. v. Harbor Reg'l Ctr., OAH No. L2006030159, at 4 (Cal. Office of Admin. Hearings May 4, 2006) (making a Level 4I care determination in 2002 and then applying a Level 2 care determination in 2006 despite no change in claimant's condition), *available at*

with the introduction of the new scaled supplement provision. For example, in *Russell M. v. Harbor Regional Center*, the Regional Center assessed the child at a Level 4I in 2002 and again in 2004.[302] However, using the same ARM rate criteria, the Regional Center rated the child at Level 2 in 2006 despite the fact that the child's condition had actually deteriorated in the last two years.[303] The Regional Center reached its conclusion without reviewing the child's file detailing his severe deficits and based its determination upon its own arbitrary policy that no child would ever get a Level 4 rating because such children should not be living in a foster home.[304] This determination was inconsistent with the Regional Center's previous two determinations and with state law.[305] Under the current system, the supplement will be divided into sub-categories similar to the ARM rate system and, as a result, similarly-situated Dual Agency children may continue to receive varying levels of financial support since the methodologies are essentially the same.[306]

Lastly, implementing a flat rate across the board will cause the state's most vulnerable children to suffer because the severe cut in benefits does not allow for adequate care and supervision. For example, Anna P. is four years old and a Dual Agency child who has severe mental retardation, irreversible brain damage with spastic quadriplegia, seizure disorder, cerebral palsy, asthma and decreased vision from retinal hemorrhages.[307] Due to her disabilities, she cannot walk or crawl, wears braces on her feet, uses a wheelchair, does not speak and is completely dependent on adults for all of her self-help skills.[308] She takes anti-seizure medication daily to control her attacks (suffering from up to four seizures per day) and uses a nebulizer machine to treat her asthma.[309] Anna's parents cannot go to work and stay at home to provide her with the level of care and supervision that she re-

http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2006030159"; then follow "BEFORE THE" hyperlink).

[302] *Id.* at 4.

[303] *Id.* at 4–5.

[304] *Id.* at 4.

[305] *Id.*; *see* CAL. WELF. & INST. CODE § 4502(a) (West 2008) (declaring rights of developmentally disabled person to be treated under the least restrictive environment to help them maintain normal and productive lives).

[306] *Compare* CAL. WELF. & INST. CODE § 11464(c)(2)(A) (West 2008), *with* CAL. CODE REGS. tit. 17, § 56013(c)–(d) (2008).

[307] Anna P. v. Harbor Reg'l Ctr., OAH No. L 2005080958, at 3–5 (Cal. Office of Admin. Hearings Nov. 6, 2006), *available at*
http://www.documents.dgs.ca.gov/oah/dds_decisions/L2005080958.084.pdf.

[308] *Id.*

[309] *Id.*

quires.[310] Anna P., after successfully challenging the Regional Center's inadequate determination at an administrative hearing, receives the highest rate ($5159) under the old ARM rate system.[311] However, if she were to enter the system under the current flat rate system, she would receive, at most, $3006 for her care. This figure is based upon the assumption that she would meet the not-yet-determined "objective criteria" for the $1000 supplement and that the county agency would use their "discretion" to approve the additional funding.[312]

A similar example involves Mikquail D., a fourteen-year-old Dual Agency child who has a condition similar to mental retardation, asthma, degenerative brain disease and is fed through a G-tube.[313] Mikquail D. demonstrates the ability to walk and he can communicate his wants and needs, but he exhibits negative behaviors such as hyperactivity, resistiveness and non-safety awareness.[314] Mikquail D., like Anna P., receives $5159 under the old ARM rate system, but if he were to enter the system today, he would likely receive $3006.[315] Anna P. and Mikquail D. have different needs, but under the current system, there would be no distinction.

While it may be easier for the county to uniformly distribute $3006 to all children with severe disabilities, the "statewide consistency" rationale does not account for the $2133 decrease in funding to which families like Anna P.'s and Mikquail D.'s will have to adjust. In 1996, the U.S. Department of Health and Human Services commissioned a study of the children enrolled in the Washington State Medicaid program to compile data regarding the variations in cost and expenditures for Medicaid-enrolled children with chronic illnesses and disabilities.[316] The report provided data regarding the average monthly costs associated with the care of a child who has at least one of eleven selected chronic conditions such as asthma, cere-

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[310] *Id.*

[311] *Id.* at 9–10; *see* CAL. CODE REGS. tit. 17, § 56004 (2008).

[312] CAL. WELF. & INST. CODE § 11464(c)(2)(A); *see Anna P.*, OAH No. L 2005080958.

[313] Mikquail D. v. N. L.A. County Reg'l Ctr., OAH No. L 2005070954, at 3–5 (Cal. Office of Admin. Hearings Oct. 11, 2005), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2005070954"; then follow "BEFORE THE" hyperlink); s*ee* Surgery Encyclopedia, http://www.surgeryencyclopedia.com/Fi-La/Gastrostomy.html (defining a "G-tube" as a gastronomy tube, which is surgically inserted through the abdomen wall into the stomach and it is used for feeding or drainage) (last visited Mar. 22, 2008).

[314] *Mikquail D.*, OAH No. L 2005070954, at 3–4.

[315] *Id.* at 10; *see* CAL. WELF. & INST. CODE § 11464(c).

[316] *See* HENRY T. IREYS, ET AL., JOHN HOPKINS UNIV., COST OF CARE FOR MEDICAID-ENROLLED CHILDREN WITH SELECTED DISABILITIES 1–2 (1996), *available at* http://aspe.hhs.gov/daltcp/reports/carcstes.pdf.

bral palsy, mental retardation, spina bifida, etc.[317] According to the study, the average cost to treat Anna P.'s severe conditions could reach $40,000 or more per year.[318] If Anna P. lived in Washington in 1996, presumably her family would have spent between $3311 and $3929 per month to treat her conditions plus additional funds to address her other needs.[319] The expenses related to the care of Mikquail D.'s illnesses and disabilities would be approximately $21,000 per year or $1750 per month.[320] Thus, under the new law, Anna P.'s family will be under-compensated and have to struggle to make ends meet while Mikquail D.'s family could potentially be over-compensated. How can the agencies that are responsible for the care of our state's developmentally disabled, most of whom are unable to independently care for themselves, be willing to sacrifice the needs of this vulnerable population in the name of administrative efficiency?

E. FLAT RATE SYSTEM MAY HINDER THE FINALIZATION OF ADOPTIONS

Families will continue to postpone finalizing their adoptions under the new law because of disputes surrounding the scaled supplement provision.[321] CDSS claims that the flat rate structure will eliminate the problem of families contesting their level of care determination since all families will receive the same amount of funding.[322] Again, CDSS is relying on the false assumption that the families who are not granted the additional $1000 supplement will not dispute that determination. However, because county workers are authorized to use their sole discretion[323] and because the objective criteria have not yet been established, one can logically expect problems associated with the supplement to arise. It is reasonable to expect that parents will continue to postpone their adoptions until proper financial resources are in place.

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[317] *See id.* at 12.

[318] *See id* at 5–6, 12 (The study notes that particular subgroups of children may be associated with particularly high costs. For example, cerebral palsy accompanied by quadriplegia ($15,959) + epilepsy ($8613) + mental retardation ($12,126) + asthma ($3035) equal a total mean cost of $39,733 per year. The study also concluded that children with three or more conditions had substantially higher costs than children with one or two conditions ($47,153 mean costs per year for children with three or more conditions as opposed to $17,569 per year for children with two conditions.)).

[319] *See id.*; calculations *supra* note 318 ($39,733 / 12 months = $3311 and $47,153 / 12 months = $3929).

[320] *See id.* at 5–6, 12 (For example, mental retardation ($12,126) + asthma ($3035) + ADD ($5810) equal a total mean cost of $20,970 per year. The costs may be even lower than the study suggests because Mikquail's conditions are not as severe as Anna's.).

[321] *See* SUBCOMM., FIXED RATE, *supra* note 132; *see also* CAL. WELF. & INST. CODE § 11464(c)(2)(A) (2008).

[322] SUBCOMM., FIXED RATE, *supra* note 132.

[323] *See* CAL. WELF. & INST. CODE § 11464(c)(2)(A) (West 2008).

Furthermore, a foreseeable consequence of the over-simplified flat rate system may be that parents will be unable to adopt Dual Agency children at all because they will not have sufficient financial support to provide for the child's extraordinary care. A family of four with an income of less than $38,000 per year faced with having to care for a severely disabled child who could cost them more than $40,000 per year would need additional financial support to follow through with finalizing an adoption.[324] The reality is that parents may not be able to finalize the adoption of a child with severe disabilities because they just cannot afford to do so.

In conclusion, the new law does not provide substantial cost-savings because the statistics used were incomplete, inflated and contradictory. Also, the flat rate and scaled supplement provision may continue to trigger litigation, confuse the agency to which responsibility has shifted for administering the program and run the risk of inconsistent applications to children with different needs. The end result may be that potential parents will be discouraged from finalizing adoptions. Administrative ease and cost savings should not be the main concerns when creating laws associated with the care and supervision of the state's most vulnerable children.

V. NEW LAW IS LEGALLY SUSPECT AND PROVIDES INSUFFICIENT FINANCIAL RESOURCES FOR THE CARE AND SUPERVISION OF SEVERELY DISABLED DUAL AGENCY CHILDREN

A. VIOLATES FEDERAL AND STATE LAWS

The new flat rate system for Dual Agency children may violate federal and state laws because it does not require an individualized assessment of the child's needs to determine the payment amount as mandated in 42 U.S.C. § 673.[325] Federal statutes specify that the AAP amount must take into account "the circumstances of the adopting parents and the needs of the child being adopted."[326] California statutes adopt similar requirements and further define "circumstances of the family" to include the "family's ability to incorporate the child into the household in relation to the lifestyle, standard of living, and future plans and to the overall capacity to meet the

[324] *See* IREYS, *supra* note 316, at 5-6, 12.

[325] 42 U.S.C. §§ 670–679 (2006); *see* CAL. WELF. & INST. CODE § 16119(d)(1) (West 2008) (establishing that the amount of the adoption assistance benefits shall be negotiated based, in part, on the needs of the child).

[326] 42 U.S.C. § 673(a)(3).

immediate future plans and needs, including education, of the child."[327] The language of the statutes suggests that the amount of payment, one negotiated between the adopting parents and the state or local agency administering the AAP, is based upon a specific look into each child and his or her unique situation.[328]

However, the $2006 flat rate is inconsistent with the particularized assessment requirement because the amount is based upon placement rather than the "needs of the child" and the "circumstances of the family."[329] A flat rate of $2006 corresponds to a Level 3 rate determination under the ARM rate system in place in 2006.[330] Prior to implementation of the changes outlined in Senate Bill 84, Regional Centers continuously made Level 3 determinations regardless of the child's needs and circumstances.[331] They argued that a child who qualified for Level 4 care must be institutionalized, so the rate was not applicable to family homes.[332] Time and time again, administrative hearing examiners overruled the Regional Centers' posture because, by restricting the level of care determination to only Level 1 through Level 3, the child's placement was the foundation as opposed to the individualized inquiry into his or her condition and needs.[333] Thus, the new $2006 flat rate, set according to a child's placement, violates federal and state law because it does not "take into consideration the circumstances of the adopting parents and the needs of the child being adopted."[334]

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[327] CAL. WELF. & INST. CODE § 16119(d)(2) (defining "circumstances of the family").

[328] *Id.*

[329] *Id.*

[330] *See* CAL. CODE REGS. tit. 17, §§ 56002–56013 (2008) (rates *available at*, http://www.dds.ca.gov/Rates/docs/CCF_rates.pdf).

[331] *See, e.g.*, Anna P. v. Harbor Reg'l Ctr., OAH No. L 2005080958, at 5 (Cal. Office of Admin. Hearings Nov. 6, 2006), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2005080958.084.pdf; Courtney W. v. Harbor Reg'l Ctr., OAH No. L 2006040514, at 7 (Cal. Office of Admin. Hearings Aug. 14, 2006), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2006040514"; then follow "BEFORE THE" hyperlink); Destiny S. v. Harbor Reg'l Ctr., OAH No. L 2007010738, at 2–3 (Cal. Office of Admin. Hearings Mar. 20, 2007), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2007010738.084.pdf; Jacob G. v. Inland Reg'l Ctr., OAH No. L 2004060464, at 7–8 (Cal. Office of Admin. Hearings Feb. 1, 2005), *available at* http://www.documents.dgs.ca.gov/oah/dds_decisions/L2004060464.084.pdf; Russell M. v. Harbor Reg'l Ctr., OAH No. L2006030159, at 4 (Cal. Office of Admin. Hearings May 4, 2006), *available at* http://www.oah.dgs.ca.gov/DDS+Mediation+and+Hearings/search.htm (search "2006030159"; then follow "BEFORE THE" hyperlink).

[332] *See, e.g.*, cases cited *supra* note 331.

[333] *Id.*

[334] 42 U.S.C. § 673(a)(3) (2006); s*ee* CAL. WELF. & INST. CODE § 16119(d)(1)–(2).

B. VIOLATES CASE LAW

Furthermore, case law also indicates that a flat rate applied uniformly to all consumers is not in line with federal and state AAP regulations because they require an individualized assessment.[335] In *ASW v. Oregon*,[336] Plaintiffs brought suit against the State when it sent a form letter to all AAP recipients announcing a uniform decrease in their payments by 7.5%.[337] The *ASW* court held that the uniform reduction in payments violated federal regulations and case law because the intent and the language of the law "unambiguously requires the State to engage in an individualized process with each family that takes into account their unique requirements in determining the amount of their adoption assistance payments . . ."[338] Here, the language of the new laws mandating the uniform application of a flat rate also ignores the unique needs of the child and his or her family, violating the holding in *ASW v. Oregon*.[339]

Furthermore, a statute that uses language focused solely on the benefited class[340] explicitly creates a right to individualized assessments for AAP payments.[341] Like in *Rabin v. Wilson-Cocker*[342] where the phrase "each family" triggered an individualized assessment process,[343] the terms "needs of the child" and "circumstances of the adopting parents" in 42 U.S.C. § 673 also focus solely on the benefited class of individuals as to negate the aggregate focus of a flat rate.[344] In sum, case law requires that the language of 42 U.S.C. § 673 be interpreted as rejecting the uniform application of a flat rate for all Dual Agency children and as creating their federal right to an individualized payment determination.[345] The court in *ASW* explained:

> Oregon's argument that it would be economically inefficient to engage in individualized determinations for recipients of adoption assistance payments whenever it lowered its foster care maintenance payments is irrelevant. . . [Section] 673(a)(3) explicitly creates a right to individualized

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[335] *See, e.g.*, ASW v. Oregon, 424 F.3d 970, 972 (9th Cir. 2005); Rabin v. Wilson-Cocker, 362 F.3d 190, 201 (2d Cir. 2004).

[336] 424 F.3d 970 (9th Cir. 2005).

[337] *Id.* at 972.

[338] *Id.* at 977 n.12.

[339] *See id.* at 976–79; s*ee also* CAL. WELF. & INST. CODE § 11464.

[340] *ASW*, 424 F.3d at 975–78.

[341] *Rabin,* 362 F.3d at 201–02.

[342] 362 F.3d 190 (2d Cir. 2004).

[343] *Id.* at 201.

[344] 42 U.S.C. § 673 (a)(3) (2006); s*ee ASW*, 424 F.3d at 975–78.

[345] *See* 42 U.S.C. § 673 (a)(3).

> payment[s] . . . . That right cannot be abrogated for the convenience of the State.[346]

C. INCREASES LIKELIHOOD OF INSTITUTIONALIZATION OF SEVERELY DISABLED DUAL AGENCY CHILDREN AS TO VIOLATE FEDERAL STATUTES AND CASE LAW

Implementing a flat rate for Dual Agency children increases the likelihood that children with severe disabilities will be placed in institutions because low-income families will be unable to afford to bring them into their homes. The typical characteristics of those who adopt children out of the foster care system include a family of four with an income of $38,000 or less per year.[347] Parents who want to adopt a child who currently lives in a residential facility rated at a Level 4I ($5159) will find that the county will only provide them with a guaranteed monthly AAP payment of $2006.[348] The flat rate will be insufficient given that it has been determined that the caring for the child's needs costs $5159 per month and that the parents' current financial resources are minimal. Thus, these parents cannot afford to adopt a child with severe disabilities and the child will have to rely on institutional care since those facilities continue to receive financial support under the ARM rate system.[349]

Also, the premise surrounding the flat rate laws violate the Lanterman Act because these new laws promote placing children with severe disabilities in institutions.[350] The Lanterman Act mandates that these children are to be placed in the least restrictive environment to enable them to lead independent and productive lives in the community.[351] However, the past practice of only assigning no higher than a Level 3 to children with severe disabilities,[352] a policy that has now been codified under sections 11464 and 16121 of the California Welfare and Institutions Code, directly contradicts the purpose of the Lanterman Act.[353]

For example, in *Russell M. v. Harbor Regional Center*, the Regional Center refused to make a Level 4 determination (up to $5139) because

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[346] *ASW*, 424 F.3d at 976 n.9.

[347] *See* DSS, CHAR 2000, *supra* note 101.

[348] CAL. WELF. & INST. CODE § 11464 (West 2008).

[349] *See* CAL. CODE REGS. tit. 17, §§ 56002–56013 (2008) (rates *available at* http://www.dds.ca.gov/Rates/docs/CCF_rates.pdf).

[350] CAL. WELF. & INST. CODE §§ 11464, 16121, 4502 .

[351] *Id.* § 4502); s*ee* Ass'n for Retarded Citizens v. Dep't of Developmental Servs., 38 Cal. 3d 384, 388 (1985) (applying rights set forth in Lanterman Act to Regional Center consumers).

[352] *See* cases cited *supra* note 331.

[353] *See* CAL. WELF. & INST. CODE §§ 11464, 16121. *But see id.* § 4502.

"such children should be in a staffed facility, not a foster home."[354] Despite the fact that the Office of Administrative Hearings continuously rejected this policy of illegally focusing on placement rather than the needs of the child, the new laws reinstate the Regional Center's argument.[355] By choosing a flat rate of $2006, which is equivalent to a Level 3 ARM rate, policymakers are implying that only those children who need Level 3 care should be placed in foster homes or adopted.[356] Thus, in line with the Regional Center's train of thought, any child who warrants more than the flat rate should be institutionalized because he or she cannot be provided adequate care in a foster or adoptive home.[357]

Additionally, promoting the institutionalization of individuals with severe disabilities violates the *Olmstead v. L.C. ex rel. Zimring*[358] decision because this practice is discriminatory. In *Olmstead*, two women with developmental disabilities who had been voluntarily admitted to a psychiatric hospital filed suit against the Commissioner of the Georgia Department of Human Resources when their requests to be discharged from institutional care were denied.[359] The United States Supreme Court ruled that unnecessary segregation of people with disabilities in institutions is a form of discrimination that violates the Americans with Disabilities Act (ADA).[360] The Court explained that unjustified isolation in institutions is discrimination because it perpetuates the stereotype that individuals with disabilities are not worthy of participating in community life and it diminishes their participation in everyday enriching life activities.[361] Like in *Olmstead*, the current "one size fits all" approach to providing financial assistance to Dual Agency AAP children with severe disabilities is discriminatory because these children will be passed over for adoption and will not receive services in the most integrated setting possible. For example, parents faced with the choice of adopting a child with mild disabilities or adopting a child with severe disabilities are likely to choose the child with mild disabilities be-

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[354] Russell M. v. Harbor Reg'l Ctr., OAH No. L2006030159, at 4 (Cal. Office of Admin. Hearings May 4, 2006), *available at* http://www.oah.dgs.ca.gov/oah/dds_decisions/L2006030159.084.pdf. *See supra* notes 285-90.

[355] *See* cases cited *supra* note 331. *But see* CAL. WELF. & INST. CODE § 11464 (setting the flat rate at $2006 is the equivalent to a 2007 Level 3 CCF rate).

[356] *See* CAL. CODE REGS. tit. 17, §§ 56002–56013 (2008) (rates *available at* http://www.dds.ca.gov/Rates/docs/CCF_rates.pdf); *see also* CAL. WELF. & INST. CODE §§ 11464, 16121 (West 2008).

[357] *See* cases cited *supra* note 331.

[358] *See generally* 527 U.S. 581 (1999).

[359] *Id.* at 593.

[360] *Id.* at 597. *Contra* 42 U.S.C. §§ 12131–12134 (2006) (requiring that people with disabilities receive services in the most integrated setting possible).

[361] *Id.* at 600–01.

cause of the inadequate funding available for the needs of a severely disabled child. Thus, the new flat rate system discriminates against children with severe disabilities because more of them will be placed in institutions, in direct violation of *Olmstead*.

In sum, an artificial cap at $2006 (Level 3) for children with severe disabilities contradicts the mandate set forth in the Lanterman Act. As a result of providing adoptive families with thousands of dollars less than the known cost of institutional care, we will see an increase in the discriminatory practice of placing children with severe disabilities in institutions. The quality of care for the state's most vulnerable children should never be a choice between budget savings or being adopted by a family.

D. NOT COST-EFFECTIVE

The new flat rate system will ultimately cost the government more money because Dual Agency children who qualify for the highest level of care determination will be placed in institutions that are still subject to the ARM rate system when families cannot be found who can afford to care for them in their homes.[362] Foster care children with severe disabilities have a few potential options for permanency, including adoption or long term care in a Community Care Facility (CCF) or an Intermediate Care Facility (ICF).[363] A CCF is a facility that provides twenty-four hour non-medical residential care services to children who may have a physical handicap, mental impairment or may have been abused or neglected.[364] Examples include licensed foster family homes, group homes or a community treatment facility that provides mental health services.[365] CCFs continue to receive funding under the ARM rate system, so payments range from $898 to $5159 per month, depending upon the level of care determination.[366] An ICF is a health facility that provides in-patient care to ambulatory or non-ambulatory patients who have a recurring need for skilled nursing supervision.[367] ICFs cost the government approximately $4400 to $6400 per month based upon the severity of the individual's medical needs.[368] If a

[362] CAL. WELF. & INST. CODE §§ 4680–4684 (West 2008).

[363] *See* FOSTER, *supra* note 6, at 24–28; CAL. HEALTH & SAFETY CODE § 1502(a) (West 2008) (defining CCFs); *id.* § 1250(d) (defining ICFs).

[364] CAL. HEALTH & SAFETY CODE § 1502(a).

[365] *Id.*

[366] *See* CAL. CODE REGS. tit. 17, §§ 56002–56013 (2008) (rates available at http://www.dds.ca.gov/Rates/docs/CCF_rates.pdf).

[367] CAL. HEALTH & SAFETY CODE § 1250(d).

[368] *See* MEDI-CAL, DEP'T OF HEALTH CARE SERVS., LONG TERM CARE PROVIDER MANUAL 4 (2007), http://files.medi-cal.ca.gov/pubsdoco/l_manual.asp (follow "Part 2-Long Term Care (LTC)"

child is placed in a CCF or an ICF, as opposed to being adopted into a family home, the government will expend more money for their care. CDSS attempted to invalidate these concerns by presenting figures in their proposal that indicated that only a small number of Dual Agency children are eligible for CCF or ICF level care.[369] CDSS claimed that 493 of the 5636 Dual Agency children are currently receiving higher than $2006 and are "typically" at the Level 4I rate of $5159, suggesting that only 8.75% of the Dual Agency AAP population is receiving ARM rates over Level 3.[370] These numbers imply that even if this small percentage of children are institutionalized, it will not have a dramatic affect on the government's expenditures.

However, CDDS's Purchase of Services Proposal, drafted based upon the CDSS's Dual Agency Rate Proposal, implies that the majority of Dual Agency children have needs and disabilities that could require intensive care in a CCF or an ICF.[371] The new laws shift costs and CDSS projects that Regional Centers will have to expend $107,000 to provide their Dual Agency clients with respite and behavioral services.[372] CDDS proposed that $66,000 of that total cost should be funded under the HCBS Waiver, with a combination of FFP and General Fund Match, and the remaining expenses would be covered under the General Fund Other.[373] Based upon these figures, approximately 62% ($66,000 of the $107,000) of the cost would be paid to serve children who are or could be participating in the HCBS Waiver.[374]

To request funding under the Waiver, CDDS had to show that 62% of the Dual Agency children are on the Waiver or are at least eligible for the

hyperlink; then follow "Rates: Facility Per Diem" hyperlink) (for example, an ICF with ICF/DD Service Rates (lowest level) costs $147.64/day x 7 days/wk x 4.33 wks/mos = $4474.97 and an ICF with ICF/DD-Nursing Rates (highest level ICF, but using lowest intra-rate) costs $212.02/day x 7 days/wk x 4.33 wks/mos = $6426.33); Interview with Brian Capra, Staff Att'y, Pub. Counsel, in L.A., Cal. (Feb. 11, 2008) (assisting with the mathematical computation and implications of the costs).

[369] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227.

[370] *See id.* (calculating 493 our of 5636 = 8.75%, based upon the assumption that all of these children were receiving the highest amount as CDSS led legislators to believe).

[371] Interview with Brian Capra, Staff Att'y, Pub. Counsel, in L.A., Cal. (Feb. 11, 2008); *see* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227. *But see* DDS, PURCHASE OF SERVS., *supra* note 178, at E15.1.

[372] *See* DDS, PURCHASE OF SERVS., *supra* note 178, at E15.1, E15.4; *see also* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227.

[373] DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227. *See generally* DDS, HCBS MANUAL, *supra* note 71 (describing HCBS waiver and eligibility requirements).

[374] DDS, PURCHASE OF SERVS., *supra* note 178, at E15.4; *see, e.g.*, DDS, HCBS MANUAL, *supra* note 71 (describing HCBS waiver and eligibility requirements).

Waiver.[375] Again, to be eligible for the HCBS Waiver, one of the requirements is that the individual has a condition that "significantly affect[s] the consumer's ability to perform activities of daily living . . . and/or participate in the community."[376] Thus, implicit in its proposal to fund the changes to the law, CDSS is suggesting that there are currently many more Dual Agency children in the system. While CDSS asserts that only 493 (8.75%) Dual Agency children have severe disabilities, CDDS's numbers suggest that 3494 (62%) actually qualify for the highest level of care.[377] It follows that the government was actually under-funding the AAP prior to the implementation of the new laws given the substantial number of Level 4 eligible Dual Agency children.

Thus, the new laws will cost the government more because HCBS Waiver eligible children will, with greater frequency, be placed in higher level CCFs or ICFs since their needs are too severe to be covered with $2006. Under the old laws, a Dual Agency AAP child receiving a Level 4I rate of $5159 would cost the government $61,908 per year.[378] However, the changes to the law will force a child with severe disabilities into an institution, such as an ICF, where the government could potentially expend over $6426 per month or over $77,112 per year.[379] In sum, it appears that the most cost-effective system was already in place under the ARM rate system.

V. SOLUTION

The Dual Agency flat rate bill is injudicious because it was passed through the Budget without proper research, analysis or commentary by those it affects. Clarity and efficiency at the expense of children with the most needs is an unacceptable justification for rushing a policy through Legislature, especially one that will have such an enormous fiscal impact on children with severe disabilities. No evidence was presented to show that the affected families did not need the $2153 that was cut from their funding.[380] Nor was any evidence presented to suggest that the families

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[375] *See, e.g.*, DDS, HCBS BROCHURE, *supra* note 60; DDS, HCBS MANUAL, *supra* note 71.

[376] *See, e.g.*, DDS, HCBS MANUAL, *supra* note 71 app. 2 at attachment I (describing HCBS waiver and eligibility requirements).

[377] *Compare* DUAL AGENCY RATE PROPOSAL, *supra* 5, at 228 *with* DDS, PURCHASE OF SERVS., *supra* note 178, at E15.4.

[378] *See* CAL. CODE REGS. tit. 17, §§ 56002–56013 (2008) (calculating $5159/mos x 12 mos/yr = $61,908/yr.) (rates *available at*, http://www.dds.ca.gov/Rates/docs/CCF_rates.pdf).

[379] *See* MEDI-CAL, LONG TERM CARE PROVIDER MANUAL, *supra* note 368 (calculating $6426/mos x 12 mos/yr = $77,112, assuming the child is placed in the highest level ICF).

[380] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 5.

were using the money for anything other than the care and supervision of their child with severe disabilities.[381] There was absolutely no evidence presented to demonstrate that these families were being overcompensated. Thus, there needs to be reform that is based upon statistics regarding the actual costs associated with the care of a child with certain disabilities.

A. ALTERNATIVE RATE-SETTING METHODOLOGY FOR DUAL AGENCY AAP CHILDREN

Real costs, as opposed to hypothetical projections such as those used by CDSS and CDDS in their proposal, must be used to ensure that Dual Agency AAP families are receiving the financial support they need to meet the child's needs. A logical place to begin to establish a baseline is with the statistics presented by the United States Department of Agriculture (USDA) regarding the annual cost to care for a child who does not have special needs.[382] The USDA takes into account real life expenses such as housing, food, transportation, clothing, health care not covered by insurance, child care, education and miscellaneous personal care expenses for a child without special needs.[383] According to USDA statistics, the average monthly cost of caring for a healthy child who is between three to five years old, for example, in a low income ($28,000 average annual income) household is approximately $895.[384] Applying these factors to the AAP, one can calculate the baseline cost associated with the care of a child with disabilities.

Once a baseline is established, thresholds based upon the severity of the child's disabilities can be easily quantified into a multi-tiered system, so that each child is receiving an individualized assessment and the amount of financial assistance is based on their unique needs and circumstances. While the new law makes an attempt at creating a multi-tiered system with the language of "up to $1000" for the supplement, there is no factual basis to support why the total amount of payments should be capped at $3006.[385] Here, the thresholds must be based on the severity of the disability. Again,

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[381] *See id.*

[382] CTR. FOR NUTRITION POLICY & PROMOTION, U.S. DEP'T OF AGRIC., PUBL'N NO. 1528-2006, EXPENDITURE ON CHILDREN BY FAMILIES, 2006 1 (2006), *available at* http://www.cnpp.usda.gov/Publications/CRC/crc2006.pdf [hereinafter USDA, EXPENDITURE ON CHILDREN].

[383] *Id.* at 2.

[384] *Id.* at 19 (calculating costs for an only child at $8660 x 1.24 = $10,738.40 per year / 12 months = $894.87 per month).

[385] CAL. WELF. & INST. CODE § 11464(c)(2)(A) (West 2008).

costs that Dual Agency AAP families actually expend in the care of the child should be used as part of the calculations.

Under a multi-tiered classification system, the child's deficits are divided into three categories: Mild, Moderate and Severe. A child with mild deficits is one who demonstrates self-help skills, but requires extraordinary time or expense on the part of the parent. For example, a child with mild deficits may be a high-functioning child with autism who demonstrates the ability to feed, dress, and bathe himself, but requires therapy services to address sensitivities to certain sounds or tastes, difficulties engaging in age-appropriate play with his peers and/or educational concerns in order to allow him to enjoy full integration into mainstream society. Secondly, a child with moderate deficits is one who cannot accomplish some age-appropriate self-help skills such as eating, bathing, toileting, or dressing and requires parents who are specially trained to provide for their daily care and treatment. To illustrate, consider a child with moderate mental retardation who demonstrates the ability to walk, but may have a special medical need such as routine nursing care, may experience infrequent and short absences from school due to doctor's appointments or illness and may have behavior challenges that require constant attention and reinforcement. Lastly, a child with severe deficits is one who requires adult assistance in more than one area of self-help skills and requires parents who are extensively trained to provide an appropriate level of care for their child who has multiple handicaps. An example includes a child with profound mental retardation who is wheel-chair bound, may have a seizure disorder uncontrolled by medication, may be tube fed, may experience frequent doctor visits and hospitalizations, may experience frequent absences from school and may demonstrate severe behavior challenges that result in damage to property, self or others. Thus, the three baseline categories are hierarchical and take into account each child's specific conditions, needs, and familial circumstances.

Additionally, a point system can be used when assessing the child to quantify their level of deficit. For example, one could assign a score of one for a mild deficit, a score of five for a moderate deficit and a score of ten for a severe deficit. To distribute points, the assessor must take into account the following factors: the child's age and size (height and weight, etc), ambulatory status (crawl, walk, walk with supports, wheel-chair bound, etc), medical conditions (diagnoses, G-tube, medications, etc), self-help skills (eating, bathing, dressing, toileting, etc) and behavioral characteristics (self-injurious, tantrums, safety awareness, etc). The total score can then be used to place the child into a certain category where monetary

amounts are assigned based upon the actual costs parents are spending for the care of the child.

In sum, a new scaled system can be created which would be more in line with the actual costs involved in caring for a child with severe disabilities and would take into account the child's specific needs. To address concerns regarding government over-spending, if in fact this was occurring, reformation of the entire AAP system is necessary.

B. CREATING A MORE COST-EFFICIENT SYSTEM

For years, government officials have raised concerns regarding the cost of administering the Adoption Assistance Program in California.[386] More and more children are entering the system and meeting the eligibility requirements to receive AAP benefits.[387] For example, in FY 2000–01, the AAP caseload peaked at a 21% growth rate and in FY 2005–06, 89% of children adopted out of the foster care system received AAP payments.[388] As a result, the Governor's Budget for the program has grown from $57,600,000 in 1995 up to $248,000,000 in 2005.[389] CDSS and CDDS responded to the increased cost concerns with their Dual Agency flat rate proposal that cuts millions of dollars necessary for the care of children with severe disabilities.[390] A better alternative is to reform the entire Adoption Assistance Program without focusing solely on Dual agency children.

Reforming the entire AAP would allow for the elimination of the new flat rate system because costs could be saved from more expendable areas of the program that will not have such a detrimental affect on those that need the financial support the most.[391] To administer a more cost-efficient

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[386] HEALTH & SOC. SERVS., LEGISLATIVE ANALYST'S OFFICE (LAO), ADOPTIONS PROGRAM C256 (2004), *available at* http://www.lao.ca.gov/analysis_2004/health_ss/healthss_anl04.pdf [hereinafter LAO AAP ANALYSIS].

[387] *See* LAO AAP ANALYSIS, *supra* note 386; *see also* ESTIMATES & RESEARCH SERVS. BRANCH, DEP'T OF SOC. SERVS., MAY 2007 REVISE CASELOAD 51 (2007), *available at* http://www.dss.cahwnet.gov/cdssweb/entres/localassistanceest/May07/03Caseload.pdf [hereinafter DSS, MAY 2007 REVISE CASELOAD].

[388] DSS, MAY 2007 REVISE CASELOAD, *supra* note 387; ADMIN. FOR CHILD. & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006 7 (2006), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf [hereinafter AFCARS 2005] (indicating that the majority of children adopted with public agency involvement (e.g., L.A. County DCFS) are receiving an adoption subsidy).

[389] LAO AAP ANALYSIS, *supra* note 386, at C257.

[390] *See* DUAL AGENCY RATE PROPOSAL, *supra* note 5, at 227; DDS, PURCHASE OF SERVS., *supra* note 178, at E15.1.

[391] LAO AAP ANALYSIS, *supra* note 386, at C255 (calling for reform of the entire Adoption Assistance Program).

program, it is necessary to identify areas of the Adoption Assistance Program that are not in line with the Legislative intent to "benefit children residing in foster homes by providing the stability and security of permanent homes" and not to "increase expenditures but to provide for payments to adoptive parents to enable them to *meet the needs of the children* . . . ."[392] Policymakers should concentrate on the needs of the child and not solely on saving money. Fortunately, the Legislative Analyst's Office (LAO) undertook such a task and identified several significant ways that the Legislature could control AAP costs, one of which will be discussed here.[393]

AAP eligibility should be more closely tied to need, as is mandated by federal law,[394] because some children and their families do not require ongoing financial support.[395] One way to link AAP eligibility with the needs of the child is to narrowly define "special needs."[396] Currently, AAP eligibility is solely determined by whether or not the child meets the definition of "special needs."[397] The purpose of characterizing a child as "special needs" is to identify those children who would otherwise be hard to place and consequently endure a longer stay in the foster care system.[398] However, the largest qualifying characteristic of AAP children, "comes from an adverse parental background," allows for virtually every child who is adopted out of the foster care system to qualify for the AAP, regardless of whether or not they are hard to place.[399] Like the flat rate system, the AAP treats children similarly regardless of their individual circumstances. For example, a healthy baby who was taken away from his drug-addicted mother would be considered as hard to place as would three adolescent-aged, African-American, physically disabled siblings (assuming that they are not Regional Center clients).[400] Presumably, the healthy infant would not require the ongoing financial support that the three siblings would, but the AAP does not make that distinction. The LAO suggests eliminating the catchall category of "adverse parental background."[401]

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[392] CAL. WELF. & INST. CODE § 16115.5 (West 2008) (emphasis added).

[393] *See* LAO AAP ANALYSIS, *supra* note 386, at C263–65.

[394] *See* 42 U.S.C. § 673 (2006).

[395] *See* LAO AAP ANALYSIS, *supra* note 386, at C262.

[396] *Id.* at C264–65.

[397] 42 U.S.C. §§ 670, 673(a) – (b) .

[398] 42 U.S.C. § 673(c); CAL. WELF. & INST. CODE § 16120(a)(1)–(2).

[399] LAO AAP ANALYSIS, *supra* note 386, at C258–59. *See* DSS, CHAR 2000, *supra* note 101, at 72 (indicating that 32% of AAP eligible children fell into the "adverse parental background" category).

[400] *See* LAO AAP ANALYSIS, *supra* note 386, at C258.

[401] *Id.* at C264–65.

Redefining the definition of "special needs" would save money because the AAP caseload could be reduced by as much as 30%.[402] Federal law allows states the flexibility to define "special needs" narrowly or broadly.[403] 42 U.S.C. § 673(c)(2) defines a child with special needs as one where there exists:

> a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section . . . .[404]

Thus, California can restrict their definition of special needs to reduce the AAP caseload and save money. Nonetheless, to recognize that children who do come from an adverse parental background are at risk of developing a condition that would qualify them as "special needs," the Legislature can ensure that parents remain eligible for deferred benefits.[405] Therefore, if a child later develops a mental or emotional problem, for example, the adoptive parents will still have access to AAP benefits.[406]

Another way the LAO suggests connecting AAP eligibility with needs is to eliminate the increase in benefits as the child ages.[407] On average, AAP children receiving a basic rate[408] receive approximately $45 per month more as they age through the system, beginning at $425 per month for children under the age of four and reaching up to $597 for children over the age of fourteen.[409] These increases are automatic and do not require a demonstration of need.[410] Like the flat rate system, an age-driven grant increase does not take into account the specific child's unique needs and circumstances.[411] Eliminating the automatic age increases could save over $2,000,000, according to the LAO.[412]

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[402] *See* statistics cited *supra* note 399.

[403] 42 U.S.C. § 673(c)(2).

[404] *Id.*

[405] LAO AAP ANALYSIS, *supra* note 386, at C265.

[406] *Id.*

[407] *Id.* at C263–64.

[408] CHILDREN'S RIGHTS PROJECT, PUBLIC COUNSEL, QUICK REFERENCE GUIDE TO FOSTER CARE/ADOPTION ASSISTANCE PROGRAM (AAP) RATES FOR CHILDREN WITH SPECIAL NEEDS 3 (2002), *available at* http://www.publiccounsel.org/publications/rates.pdf (In Los Angeles County, AAP eligible children that do not have any other special needs (i.e., physical or mental) receive the Basic "B" Rate).

[409] *E.g.*, LAO AAP ANALYSIS, *supra* note 386, at C263–64.

[410] *E.g.*, *id.*

[411] *See id.* at C264.

[412] *See id.*

Therefore, reforming the entire Adoption Assistance Program will negate the necessity of a flat rate for Dual Agency children because the savings generated by redefining "special needs" and eliminating the age-driven increases may offset the alleged savings of the new laws. Dual Agency AAP children can continue to receive the financial support based upon their individual needs and the circumstances of their family under the scaled system set forth above and the government can decrease expenditures under a more cost-effective program.

VI. CONCLUSION

The agencies responsible for the protection and care of the State's most vulnerable children have framed the issue as purely an administrative one. Their goal was to find the easiest way to distribute federal and state funds by minimizing their administrative tasks and eliminating their responsibility to provide an individualized payment determination. Federal and State regulations as well as case law require that the primary focus be on providing adequate funding to the State's most vulnerable children and their families in an effective and cost-efficient manner.

In reality, the flat rate solution to problems of government "overspending" and "increased litigation" is not cost-effective considering the number of children who will likely end up institutionalized. Proponents of the flat rate claim substantial cost savings through this measure, but the Governor himself announced that the Budget would see "[a]n increase of $30,800,000 [] to create a standard rate paid to foster care and adoptive families who care for children with developmental disabilities."[413] It is imperative that other options be explored to provide sufficient resources to parents adopting severely disabled Dual Agency children in order to carry out the mandates of the Lanterman Act and federal and state adoption laws. Saving money should not be a priority with respect to the care of the State's most vulnerable children and their needs should not be sacrificed in the name of administrative ease.

[413] Press Release, Office of the Governor, Governor Schwarzenegger Signs Legislation to Protect California Foster Youth (Oct. 11, 2007), *available at* http://gov.ca.gov/index.php?/press-release/7679/.