

DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, California 95814



November 2, 2006

ALL COUNTY LETTER NO. 06-40

TO: ALL COUNTY WELFARE DIRECTORS
ALL COUNTY CHILD CARE COORDINATORS
ALL COUNTY CHILD WELFARE SERVICES PROGRAM MANAGERS
ALL COUNTY CHIEF PROBATION OFFICERS
ALL COUNTY LICENSING MANAGERS

REASON FOR THIS TRANSMITTAL

- State Law Change
 Federal Law or Regulation Change
 Court Order
 Clarification Requested by
One or More Counties
 Initiated by CDSS

SUBJECT: MARY GLESMANN v. SAENZ et al. IMPACT ON LICENSED FOSTER FAMILY HOMES AND FAMILY CHILD CARE HOMES, AND RELATIVE/NON-RELATIVE EXTENDED FAMILY MEMBER (NREFM) CAREGIVER APPROVALS

This letter addresses a number of changes to the policies and procedures used to conduct criminal background checks for licensed Foster Family Homes, Family Child Care Homes, and approving relative/NREFM caregivers necessitated by the Court of Appeals ruling in the Glesmann v. Saenz (2006) 140 Cal.App.4th 960 et al. court case.

On June 22, 2006, the First District Court of Appeals affirmed the lower court decisions in the above court case and ruled against the California Department of Social Services (CDSS). This litigation challenged criminal record background check procedures in the handling of certain specified crimes as non-exemptible, the constitutional sufficiency of the CDSS' notification of denial of a criminal record clearance for individuals convicted of non-exemptible crimes, and handling of Certificates of Rehabilitation for otherwise non-exemptible crimes involving Community Care Licensing facilities.

Specifically, the court held that:

- The current CDSS notification process violates due process protections. According to the court's order, because future notices to individuals having a non-exemptible crime must include designation of the standards used to reach the non-exemptible determination, notices must:
 - Identify the non-exemptible crime;
 - Identify the documents or other materials relied upon; and
 - Specify the date and court in which the conviction occurred, if known.

- The CDSS' interpretation of Penal Code section 667.5(c) was incorrect. The CDSS had previously construed all crimes listed in this section as non-exemptible. The court determined that crimes listed in Penal Code section 667.5(c) are non-exemptible only if, as required under the licensing statutes, they are a "crime against an individual" which the court reasoned requires the use of force or the threat to inflict harm. Specifically the court held that "occupied burglary" as set forth in Penal Code section 667.5(c)(21), (first degree burglary of an inhabited dwelling where it is charged and proved that another person, other than an accomplice was present), did not constitute a "crime against an individual" as a conviction could occur without there ever having been any contact with another person. It was therefore held to be exemptible.
- Individuals associated with facilities or homes governed by the Community Care Facilities Act, and who have obtained a Certificate of Rehabilitation for second degree robbery, will be eligible to seek an exemption. Of the four Health and Safety Code sections that establish the CDSS' licensing scheme, only the Community Care Facilities Act at Health and Safety Code section 1522 (g)(1)(A)(ii), allows an individual who has obtained a Certificate of Rehabilitation to seek an exemption for certain specified otherwise non-exemptible crimes such as murder and mayhem, but not for the arguably less serious offense of second degree robbery. The court held that this violated equal protection principles.

As a result of this decision, the Community Care Licensing Division (CCLD) Evaluator Manual has been updated to reflect the new requirements. New and revised letters for use in the background check process are included in the CCLD Evaluator Manual, Appendix H.

POLICY FOR LICENSED FOSTER FAMILY HOMES AND FAMILY CHILD CARE HOMES

Notice of Non-Exemptible Crime

The revised process will require that, in addition to sending a notice to the licensee that an individual associated with the facility has been convicted of a non-exemptible crime, a second notice must be sent to the individual. The notice to the individual must:

- List the specific non-exemptible conviction(s);
- Identify the documents or materials relied upon in making the determination that the crime(s) for which the individual was convicted is/are non-exemptible (this will usually be the applicable Health and Safety Code section and the criminal history information received from the Department of Justice); and
- If known, provide the approximate date and court location where the conviction occurred.

In cases in which there are multiple or co-licensees, only one of whom has been convicted of a non-exemptible crime, the licensing agency must send the “non-exemptible” notice to the licensees jointly, and a second notice addressed to the licensee convicted of the non-exemptible crime. The notice to the licensee convicted of a non-exemptible crime must include the information bulleted above.

Non-Exemptible Crimes as Identified in Penal Code Section 667.5(c)

The court concluded that only crimes in Penal Code 667.5(c) that were “against an individual” as specified in the licensing statutes, could be deemed as non-exemptible crimes. The crimes in Penal Code 667.5(c) have been evaluated for whether they meet the court’s interpretation. Accordingly:

- Occupied Burglary as specified in Penal Code section 667.5(c)(21), a first degree burglary of an inhabited dwelling wherein it has been charged and proved that another person other than an accomplice was present during the commission of the burglary, is exemptible. Individuals convicted of this crime have the right to request an exemption.
- Arson of an Inhabited Structure [PC 451(b)] is exemptible. Individuals convicted of this crime have the right to request an exemption. However, arson [PC 451(a)] causing great bodily injury remains non-exemptible.

These crimes have been removed from the non-exemptible crimes list.

Certificate of Rehabilitation – for facilities governed by Health and Safety Code Section 1522

Individuals who have obtained a Certificate of Rehabilitation for second degree robbery will be eligible to seek an exemption. This is consistent with current practice implemented July 21, 2004.

POLICY FOR RELATIVE/NREFM CAREGIVER APPROVAL

Notice of Non-Exemptible Crime

The revised process requires that in addition to sending a notice to the caregiver that an individual residing in the home has been convicted of a non-exemptible crime, a second notice must be sent to the individual. The notice to the individual must:

- List the specific non-exemptible conviction(s);
- Identify the documents or materials relied upon in making the determination that the crime(s) for which the individual was convicted is/are non-exemptible (this will usually be the applicable Health and Safety Code section and the criminal history information received from the Department of Justice) and,
- If known, provide the approximate date and court location where the conviction occurred.

In cases in which there are multiple caregivers, only one of whom has been convicted of a non-exemptible crime, the approval agency must send the “non-exemptible” notice to the caregivers jointly, and a second notice addressed to the caregiver who has been convicted of a non-exemptible crime. The notice to the caregiver convicted of a non-exemptible crime must include the information bulleted above.

Non-Exemptible Crimes as Identified in Penal Code Section 667.5(c)

The revised policy and procedure regarding Penal Code Section 667.5(c) non-exemptible crimes for licensed foster family homes is also applicable to the relative/NREFM approval process; please refer to that section in this letter.

Certificate of Rehabilitation – for facilities governed by Health and Safety Code Section 1522

The revised policy and procedure regarding Certificates of Rehabilitation for licensed foster family homes is also applicable to the relative/NREFM approval process; please refer to that section in this letter.

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Questions regarding the implementation of this letter for relative/NREFM caregiver approvals should be directed to the Kinship Care Policy and Support Unit at (916) 657-1858. Questions regarding county licensing should be directed to the designated county liaison.

Sincerely,

Original Document Signed By:

JO FREDERICK
Deputy Director
Community Care Licensing Division

Original Document Signed By:

MARY L. AULT
Deputy Director
Children and Family Services Division

c: California Welfare Directors Association