

**RESOLUTION 07-08-05**

**DIGEST**

Child Protective Services: Due Process for the Subject of Investigation

Amends Penal Code section 11169 and adds Penal Code section 11169.1 to provide an appellate process before a report of suspected child abuse is submitted to the Child Abuse Central Index.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 11169 and adds Penal Code section 11169.1 to provide an appellate process before a report of suspected child abuse is submitted to the Child Abuse Central Index. This resolution should be approved in principle because it provides important due process protections that are currently lacking.

The Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) authorizes persons to report suspected child abuse or neglect to certain public agencies. Those agencies conduct an "active investigation" to determine if the charges are "unfounded," "substantiated," or "inconclusive." Unless the allegations are unfounded, the report is forwarded to the Department of Justice for inclusion in the Child Abuse Central Index, often with no notice to the person named in the report.

The CACI is then used to respond to requests for information from law enforcement, social service agencies, licensing agencies, employers seeking applicants for positions involving supervisorial or disciplinary power over children, and court investigators. (Pen. Code, § 11170.) Thus any adult seeking to become a teacher, child care worker, foster or adoptive parent, or peace officer may have their name turned over as a result of allegations which they never had an opportunity to refute. This may have devastating repercussions on a person's life and livelihood.

In *Burt v. County of Orange* (2004) 120 Cal.App.4th 273, the Court of Appeal held that due process required that "a person named as a suspected child abuser [be] entitled to present a timely challenge to a previously filed report and [be] given a reasonable opportunity to rebut the charge." (*Id.* at p. 285.) The Court did not specify the scope or manner of hearing to be provided. This resolution seeks to provide that process. While the proposed process is perhaps unduly cumbersome for both the person named and the public agencies involved, it provides a needed opportunity for the review of the underlying charges and the appropriateness of inclusion of the person in the Index.

In the absence of a mandated appeal process, persons named in the CACI currently must expend large amounts of time and money to get their names out of the system, often while important personal aspects of the person's life are put on hold. An opportunity for review and for the person named to rebut the charges must be provided and this resolution is one possible means of providing that opportunity.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code Sections 11169 and enact Section 11169.1, to read as follows:

- 1 § 11169
- 2 (a) An agency specified in Section 11165.9 shall forward to the Department of Justice a report in
- 3 writing of every case it investigates of known or suspected child abuse or severe neglect which is
- 4 determined not to be unfounded, other than cases coming within subdivision (b) of Section 11165.2.

5 An agency shall not forward a report to the Department of Justice unless it has conducted an active  
6 investigation and determined that the report is not unfounded, as defined in Section 11165.12. If an  
7 appeal is timely requested under Section 11169.1, an agency shall not forward a report to the  
8 Department of Justice until the sooner of the Review Panel issuing its decision or 90 days after the  
9 request for an appeal. If a report has previously been filed which subsequently proves to be  
10 unfounded, the Department of Justice shall be notified in writing of that fact and shall not retain the  
11 report. The reports required by this section shall be in a form approved by the Department of Justice  
12 and may be sent by fax or electronic transmission. An agency specified in Section 11165.9 receiving  
13 a written report from another agency specified in Section 11165.9 shall not send that report to the  
14 Department of Justice.

15 (b) At the conclusion of the investigation, the agency shall notify the subject in writing that the agency  
16 has determined that the report is unfounded, inconclusive, or substantiated. Before the time an  
17 agency specified in Section 11165.9 forwards a substantiated or inconclusive report in writing to the  
18 Department of Justice pursuant to subdivision (a), the agency shall also notify in writing, send two  
19 simultaneous written notices, one via first-class mail and one via certified mail, return receipt  
20 requested, to the last known address of the known or suspected child abuser that he or she has been  
21 will be reported to the Child Abuse Central Index. The notice required by this section shall be in a  
22 form approved by the Department of Justice. The requirements of this subdivision shall apply with  
23 respect to reports forwarded to the department on or after the date on which this subdivision  
24 becomes operative.

25 (c) At a minimum, the notice shall include the following information:

26 (1) Information on how to appeal the proposed placement of the subject's name in the Child Abuse  
27 Central Index pursuant to the provisions of section 11169.1.

28 (2) The type of abuse or neglect, date(s) of the incident(s), the date the incident was reported to the  
29 county agency, which county agency investigated the report, the date the county agency determined  
30 that the report was "substantiated" or "inconclusive," the basis for the determination, and information  
31 concerning persons or agencies that have access to the Central Index.

32 (3) The circumstances under which information contained in the Child Abuse Central Index will be  
33 provided to other individuals or agencies.

34 (4) The right of the subject to request a review of the county's substantiated or inconclusive report  
35 and record by the county agency's Review Panel if the individual disagrees with the entry of the  
36 substantiated or inconclusive report in the Child Abuse Central Index.

37 (5) The right of the subject, if the determination is upheld by the county agency's Review Panel, to  
38 have a hearing before an Administrative Law Judge from the State Hearings Division of the  
39 Department of Social Services at which the agency would bear the burden of proof.

40 (6) The scope of the appeal is limited to disputing the accuracy of the content and determination of  
41 the report to be entered into the Child Abuse Central Index and that the Department of Social  
42 Services will be responsible for defending that action at the fair hearing.

43 (7) A full explanation of all alternatives and deadlines contained in Section 11169.1.

44 ~~(e)~~ (d) Agencies shall retain child abuse or neglect investigative reports that result in a report filed with  
45 the Department of Justice pursuant to subdivision (a) for the same period of time that the information  
46 is required to be maintained on the Child Abuse Central Index pursuant to this section and  
47 subdivision (a) of Section 11170. Nothing in this section precludes an agency from retaining the  
48 reports for a longer period of time if required by law.

49 ~~(d)~~ (e) The immunity provisions of Section 11172 shall not apply to the submission of a report by an  
50 agency pursuant to this section. However, nothing in this section shall be construed to alter or  
51 diminish any other immunity provisions of state or federal law.

52  
53 § 11169.1.

54 (a) The subject of the investigation may request the reporting agency to review the investigation  
55 before the agency submits the report to the Department of Justice required under Section 11169(a).  
56 The request must be made in writing, and must be sent certified mail, return receipt requested. The  
57 request shall be postmarked no later than thirty (30) calendar days after the date of receipt of the  
58 notice sent to the subject in accordance with Section 11169(b). If the request for review is filed more

59 than thirty (30) days from the date of receipt of the notice, the appellant must show good cause for  
60 not appealing within the prescribed period.

61 (b) Each reporting agency shall appoint a Review Panel composed of at least three persons to review  
62 the investigation upon request. No social worker who participated in the investigation shall be part of  
63 the Review Panel.

64 (c) The subject will have fourteen (14) calendar days from requesting the review to present  
65 statements of witnesses and other evidence on his or her behalf in writing to be considered by the  
66 Review Panel.

67 (d) The Review Panel shall review the records of the investigation and the evidence submitted by the  
68 subject and shall determine whether the determination that the report was substantiated or  
69 inconclusive is supported by a preponderance of the evidence.

70 (e) Within ninety (90) calendar days of receiving the subject's request for review the Review Panel  
71 shall either confirm the accuracy of the content of the report and determination or shall change the  
72 determination to unfounded. The Review Panel shall notify the subject of its decision in writing by  
73 certified mail, return receipt requested. If the Review Panel fails to review the determination or fails to  
74 notify the subject of its decision before the expiration of the ninety (90) calendar days, the  
75 determination will be deemed to be unfounded.

76 (f) If the subject of the investigation requests review in a timely manner in accordance with this  
77 section, no report will be forwarded to the Department of Justice until after the Review Panel  
78 completes its review. If a late appeal is allowed for good cause in accordance with subsection  
79 11169.1(a) the report shall be entered on the Central Index pending the outcome of the appeal.

80 (g) Upon receipt of written notice of an unfavorable decision of the Review Panel, the subject shall  
81 have thirty (30) calendar days to request an administrative hearing before an Administrative Law  
82 Judge from the State Hearings Division of the Department of Social Services.

83 (1) The grounds for appeal to the Administrative Law Judge shall consist of the following:

84 (A) The findings are not supported by a preponderance of evidence; or,

85 (B) The actions ultimately found to be abusive or neglectful do not meet the statutory or regulatory  
86 definitions of child abuse or neglect by a preponderance of the evidence.

87 (2) The written appeal shall include a statement detailing the basis for the appeal.

88 (3) If the appeal is filed more than 30 days from the date of the Review Panel's notice, the appellant  
89 must show good cause for not appealing within the prescribed period.

90 (4) The subject may have legal representation and present witnesses and other evidence on his or  
91 her behalf.

92 (5) The burden of proof in such a hearing shall be on the agency. The agency must prove that the  
93 determination is supported by a preponderance of the evidence.

94 (6) The administrative law judge shall enter an initial decision for review by the Department of Social  
95 Services no later than 90 calendar days from the date of the administrative hearing. The  
96 administrative law judge's decision shall be in writing and shall contain findings of fact and a  
97 determination of the issues presented.

98 (7) Within 30 days after the department has received a copy of the administrative law judge's  
99 proposed decision, the director may adopt the decision in its entirety; decide the matter on the record,  
100 including the transcript, with or without taking additional evidence; or order a further hearing to be  
101 conducted before the director, or another administrative law judge on behalf of the director. Failure of  
102 the director to adopt the proposed decision, decide the matter on the record, including the transcript,  
103 with or without taking additional evidence or order a further hearing within the 30 days shall be  
104 deemed an affirmation of the proposed decision. When the director adopts the administrative law  
105 judges' decision or decides the matter, a copy of the decision shall be served on the subject and on  
106 the affected county agency by certified mail, return receipt requested, and, if the director's decision  
107 differs materially from the proposed decision of the administrative law judge, a copy of that proposed  
108 decision shall also be served on the subject and on the affected county agency. If a further hearing is  
109 ordered, it shall be conducted in the same manner and within the same time limits specified for the  
110 original hearing.

111 (g) Judicial review of the final Department of Social Services decision may be had by filing a petition  
112 for a writ of mandate within 60 days of receipt of the decision under the provisions of Section 1094.5

113 of the Code of Civil Procedure, praying for a review of the entire proceeding in the matter.  
114 (h) All records submitted by the parties as part of the appeal process and all notices, orders, agency  
115 notes, final agency decisions, created by or made part of the Department of Social Service's or  
116 county agency's record shall be confidential and shall not be released or disclosed unless such  
117 release or disclosure is permitted by the applicable State statutes.

(Proposed language underlined, language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

#### STATEMENT OF REASONS

Existing Law: Does not provide a procedure by which a person reported to the Child Abuse Central Index may challenge that report.

This Resolution: Would establish a procedure for appeal of a report to the Child Abuse Central Index.

The Problem: The California Court of Appeal has held that the current statutory system of reporting child abuse investigations to the Child Abuse Central Index is unconstitutional because it does not protect the due process rights of the person being reported. (*Burt v. County of Orange*, 120 Cal.App.4th 273 (2004), *review denied* Sept. 15, 2004.) Under the present law, a child abuse investigation may result in a determination of unfounded, inconclusive, or substantiated. Substantiated or inconclusive findings must be reported to the Child Abuse Central Index, and either finding may severely hamper the accused's employment prospects, particularly in the fields of childcare and healthcare. There is no procedural mechanism available to the accused to challenge a finding, which the Court of Appeal found to be a denial of due process. This resolution would establish a hearing and appeals procedure to solve the unconstitutionality of the current law and ensure that the accused's due process rights are protected. To minimize fiscal impact, this administrative procedure is based on existing governmental mechanisms: the local county social services agency and the State Hearings Division of the Department of Social Services.

#### IMPACT STATEMENT

This proposed resolution affects no other laws, statutes or rules.

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