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California's protection and advocacy system

September 24, 2009

Randy Shiroi
California Department of Social Services
Adult Programs Policy Bureau
744 P Street
Sacramento, CA 95814

Dear Mr. Shiroi,

Disability Rights California is a non-profit advocacy organization mandated to advance the human and legal rights of people with disabilities. Our following comments respond only to the draft ACL on the functional-index based cuts, rather than on the underlying statute, and do not necessarily reflect the full range of our concerns.

Due Process

The notice of action provisions in the draft ACL are inadequate. The FI score (or the ranks for terminated domestic and any related services) alone does not give a recipient enough information to determine whether or not to request a hearing, much less prepare for it.

The minimum information in the notice (and the minimum information a recipient needs to contest the FI score at the hearing) are the ranks underlying the FI score used in the termination notice plus an understandable expression of how they are used in the formula for calculating the recipient's FI score. The summary paragraphs are inadequate in explaining each rank in the context of the 11 functions and how the new rules are being applied. For instance, for those being terminated because their composite FI score is below 2, the notice at a minimum must contain the following information:

- (1) list of all 11 functions and the full definitions (since it is the definition of the function that counties apply and no function is completely self-evident to the typical recipient based on the summary included in the NOA paragraphs);
- (2) weight of each function;
- (3) the recipient's rank for each function (ranking scale) minus 1;
- (4) the result of multiplying each rank-1 by the weight and the sum plus 1 = FI score; and
- (5) The definitions for each rank for each function, as in the Annotated Assessment Criteria attached to the draft ACL. The general description of the ranks (no help, verbal help, some, substantial or total help) is inadequate because that is not what the social workers use in assigning a rank.

Hearings

In addition, the draft ACL says recipients may not contest hours, i.e., claim more hours in areas not subject to a reduction for those losing domestic and/or related services. An IHSS recipient does not need a notice of action in order to challenge the number of hours authorized. An IHSS recipient may challenge at any time the number of hours authorized for any particular service. Further, a recipient may claim a higher rank without seeking additional hours. No authorized hours for IHSS services does not mean the county did not determine the person needed them. The County may have found that someone else was providing them (alternative resource). We have seen many cases where a "1" was assigned for services that could not be covered by parent or spouse providers.

Second, the rank 1 does not indicate that the recipient does not need the service because the recipient may simply have decided it was not worth appealing for a few hours. When the consequence is possible termination from all IHSS services, the issue is whether all the rankings on which the score is based are accurate, including rankings which may not change the total hours claimed. No recipient has ever had the opportunity to contest the ranks on which the termination notice is based.

IHSS and EPSDT

The draft ACL does not mention the rights of child recipients to services under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions in federal law. We request that the ACL include a description of these rights. Under the EPSDT mandate, states must

provide the necessary diagnostic and treatment services to correct or ameliorate a child's conditions, whether or not such services are covered under the state plan for adults. 42 U.S.C. § 1396d(r)(1), 42 C.F.R. § 441.56(b), 42 U.S.C. § 1396d(r)(5). Personal care services are covered under federal law, so under EPSDT, children who need additional hours have a right to them, without regard to the new restrictions in state law that are applicable to adults.

We understand that about 2/3 of the children under the age of 18 who get IHSS services have parent providers. However, the remaining children receiving IHSS solely from non-parent providers do have an EPSDT claim, and the Department must identify them and exempt them from the reductions.

Further, EPSDT includes a powerful notice and informing mandate. State EPSDT programs are required to effectively inform individuals of the screening and treatment services available under the program. 42 U.S.C. §1396a(a)(43); 42 C.F.R. §441.56(a). These EPSDT services will now include personal care services at the level children received prior to the current reductions.

Consequently, as part of its EPSDT notice obligations, CDSS must inform all children with IHSS parent providers that they can continue their same level of services if they change to a non-parent provider. The notices to children with parent providers must inform them that they will be eligible through EPSDT to continue their current level of IHSS if they change to a non-parent provider.

Requirement For Physician Verification For Any Change

This requirement is not consistent with state law and should be removed from the final ACL. First, the two Medi-Cal IHSS waiver programs, PCSP and IHSS Waiver Plus, incorporate the "determination of need and authorization requirements" of the IHSS Residual program (WIC 14132.95, subds. (f) and (i); 14132.951, subds. (b) and (e). The IHSS Residual program statutes do not require any doctor certification for any need, much less any increase in need as the ACL claims. Any information is sufficient to trigger a county's duty to reassess a recipient's need, as echoed in the CDSS regulations for the IHSS-R program which PCSP and IHSS Waiver Plus incorporate. (MPP 30-763.218, .219.) As long as a recipient claims there is some factual basis for a "change in circumstances", the county

must reassess need.

Second, the current regulations identify only one situation when a doctor's certification is relevant: when a county wishes to extend the next assessment to 18 months based on a doctor's report that the recipient's condition will not change.

Languages Including Alternative Formats

The notices must be delivered in appropriate threshold languages as confirmed in ACL 08-32 and in alternative formats if requested by recipients, as required by federal and state disability rights laws.

Literacy Level, Readability and Format

In ACL 08-32, the state compels counties to take measures “that will ensure Medi-Cal applicants/beneficiaries receive Notices of Action (NOA) that clearly communicate the accurate eligibility status and the reason why an action is being taken.” Toward this goal, we urge the state to ensure that this and all NOA’s reflect the appropriate literacy level of the IHSS beneficiaries; we suggest a sixth-grade literacy level. We also urge the state to forgo small typefaces and confusing layout in favor of legibility and clarity. The current IHSS NOA is effectively unreadable and may violate constitutional due process on this ground alone.

Higher SSI Rate

We appreciate the reference to the possibility of receiving the higher SSI rate in the text of the NOA for terminations. We request that the ACL include additional instructions to the counties to complete the SP 22 forms for SSA in a timely manner. CDSS should instruct the counties to pre-screen their caseloads and complete these forms for anyone on the termination list where the county records show they are living in the home of a relative. Otherwise, there may be a long wait before the county completes the form, during which time the recipient has lost IHSS services but not gained higher income for which she is eligible.

Entire NOA

We would like to see the entire NOA and not just the text to insert. Will it look just like the present NOA on 11 x 14 with the hours at the bottom?

Thank you for the opportunity to respond to the draft ACL. We request that CDSS respond in writing to the concerns raised by all the stakeholders.

Thank you for your attention to this letter and our requests.

Sincerely,

A handwritten signature in black ink that reads "Deborah Doctor". The signature is written in a cursive style with a prominent, sweeping flourish at the end of the word "Doctor".

Deborah Doctor
Legislative Advocate