



September 24, 2009

Via electronic mail and U.S. Mail

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Re: All-County Letter No.09-XX: Revised 9/16/09  
New In-Home Supportive Services Provider Enrollment Requirements and Revised Provider Enrollment Form

Dear Mr. Elftmann and Ms. Miguelino:

On behalf of our more than 200,000 homecare provider members, we offer comments on the September 16, 2009 draft version of the new In-Home Supportive Services Provider Enrollment Requirements and Form.

#### **Lack of Statutory Authority to require existing providers to attend provider orientation**

The draft requirements state in part

All current and prospective providers must:....2) Attend a provider orientation providing information about the rules, regulations and requirements for being an IHSS provider; (p.1 )

Chapter 17 of 2009 in Section 12301.24 states:

“(a) Effective November 1, 2009, all prospective providers must complete a provider orientation at the time of enrollment...

(c) Between November 1, 2009, and June 30, 2010 all current providers shall receive the information described in this section. Following the receipt of this information, a provider shall submit a signed agreement, consistent with the requirements of this section, to the appropriate county office.

The newly enacted statute differentiates clearly between prospective and current providers. It does not require current providers to attend orientation. A requirement for current providers to attend orientation lacks statutory authority.

#### **Lack of Clarity: Provider Enrollment Processes: Paid Time**

The All-County Letter lacks clarity because it does not specify that current providers must be paid for any obligations that are a condition of employment, including provider enrollment if it involves travel to and from county offices as well as time spent at a county office. While the cost of fingerprinting and background checks must be paid by the provider under state law, since these obligations are a condition of employment, current providers must be paid their normal hourly rate for the time spent in completing such obligations. CMIPS must be adjusted to provide for this. The All-County Letter lacks clarity on this point.

#### **SEIU's History of Support for Program Integrity in the In-Home Supportive Services Program**

Since 2003, every year, SEIU has supported and sponsored legislation to ensure program integrity in IHSS by promoting safe guard measures like DOJ live-scan fingerprinting and criminal background checks for In-Home Supportive Service providers. SEIU worked for six years on six bills to help protect program integrity in the In-Home Supportive Services program. SEIU also sponsored legislation to insure provider training. We believe “fair” processes should be in place that balance the need for ensuring program integrity with the need to ensure consumer choice of provider. Therefore, we offer the following comments related to ensuring program integrity.

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**Lack of Statutory Authority for inclusion of *any* felony**

The draft requirements state in part

Additionally, existing federal Medicaid and state Medi-Cal statutes and regulations provide that any person who has ever been convicted of a felony crime or certain serious misdemeanor crimes is ineligible to be a provider of Medicaid/Medi-Cal-funded services. (p.2)

This is a factually inaccurate characterization that implies that conviction for *any* felony at *any* time disqualifies a person from serving as a IHSS provider. This statement lacks statutory authority.

Welfare and Institutions Code Section 12305.81 was enacted by c.229 of 2004. It states:

- (a) *Notwithstanding any other provision of law*, a person shall not be eligible to provide or receive payment for providing supportive services for 10 years following a conviction for, or incarceration following a conviction for, fraud against a government health care or supportive services program, including Medicare, Medicaid, or services provided under Title V, Title XX, or Title XX1 of the federal Social Security Act or a violation of subdivision (a) of Section 273 (a) of the Penal Code, or Section 368 of the Penal Code, or similar violation in another jurisdiction.

This section of the statute which is still in force then details the statements to be included in the provider enrollment form.

Indeed, S. 12305.86 as added by AB4x 19, c. 17 of 2009 states:

- (c) Upon notice from the Department of Justice that a prospective or current provider has been convicted of a criminal offense specified in *Section 12305.81*, the county shall deny or terminate the applicant's request to become a provider of supportive services to any recipient of the In-Home Supportive Services program.

It is our understanding that CDSS believes that Welfare and Institutions Code Section 14123 supports its position regarding disqualifying crimes. For the reasons set forth above, Section 12305.81 - not Section 14123 - sets forth the applicable disqualifying crimes for IHSS providers. But even if Section 14123 did apply to IHSS providers, it could not be read to disqualify providers for all felonies. Section 14123 requires the suspension of Medi-Cal providers convicted of "any felony or any misdemeanor involving fraud, abuse of the Medi-Cal program or any patient, or otherwise substantially related to the qualifications, functions, or duties of a provider of service." Section 14123 thus substantially limits the relevant felonies that trigger its application. If it did not, and if CDSS were right that it is applicable here, then it would mean that the later enacted Section 12305.81 would be completely superfluous.

Moreover, both statute and case law with respect to disqualifying crimes across a broad spectrum of providers in social and health services limit disqualifying crimes to those that are substantially related to the duties or functions of the provider.

Inclusion of *any* felony at any time is problematic from a case law perspective. Inclusion of any felony would have a disproportionate impact on persons of color, particularly in low-income occupations such as in-home supportive service providers.

Chapter 229 of 2004, which is referenced in Chapter 17 of 2009, specifies those crimes that the Legislature has determined to be disqualifying for providers of In-Home Supportive Services.

**Lack of Clarity, Inconsistency with Statute: Provision of Criminal Record Offender Information to Current or Prospective Providers**

September 24, 2009  
Page 3

The statute plainly requires that current or prospective providers be offered a copy of the criminal history record (S.12305.86 (c)(1)) and that it be offered at no cost if the provider is indigent (S.12305.86 (c) (3)) so that the applicant or provider may "review the information for accuracy and completeness. The applicant must also be given the opportunity to challenge the information if it is inaccurate or incomplete.

Given the brief time which we have had to review these documents, we reserve the right to identify further concerns about this proposed document.

Sincerely

  
Allen Davenport  
Director, Government Relations