



**United Domestic Workers of America
AFSCME Local 3930 /AFL-CIO**

UDW EXECUTIVE BOARD

September 24, 2009

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Randy Shiroy, Chief
Adult Programs Policy Bureau
California Department of Social Services
Via E-mail: Marti.Tosta@dss.ca.gov

Rose Nguyen, Secretary/Treasurer

Rosalina Flores, Vice President

**RE: DRAFT All-County Letter – New IHSS Provider Enrollment
Requirements and Revised Provider Enrollment Form**

Russell Jones, Butte County - Addus

Dear Randy:

Amy Day, El Dorado County

The UDW Homecare Providers Union/AFSCME has carefully reviewed the draft All-County Letter regarding new provider enrollment requirements. CDSS should be well aware that it is unlawful to add or subtract from statutes and the draft ACL, in many instances, oversteps those boundaries by attempting to create unauthorized requirements within the IHSS program. The draft ACL contains a number of provisions that exceed statutory requirements and appears to be creating new and unlawful hurdles for individuals to enroll as IHSS Providers.

Margarita Jaramillo, Kern County

Edward Huddleston, Merced County

Christine Nguyen, Orange County

William Reed, Placer County

New Provider Enrollment Requirements (page 1 of the draft ACL):

Martha Martinez, Riverside County

- (1) "Submit fingerprints and undergo a criminal background check by the California Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI);"

Rosa Ramirez, Riverside County - Addus

Editha Adams, San Diego County

COMMENT: This sentence should include the statutory deadline of July 1, 2010 to complete the criminal background check pursuant to Welfare & Institutions Code 12305.86. The sentence should delete the words "and the Federal Bureau of Investigation (FBI)" because this is not required in the criminal background check process established pursuant to Welfare & Institutions Code 15660.

Gerald Ashby, San Diego County

Paula Fisk, San Luis Obispo County

Feel Good, Santa Barbara County

- (2) "Attend a provider orientation providing information about the rules, regulations and requirements for being an IHSS provider;"

Elva Munoz, Santa Barbara County - Addus

Roxann Chakos, Stanislaus County

COMMENT: This sentence should distinguish between the requirement established in Welfare & Institutions Code 12301.24 (a) for **applicants** to attend an in-person orientation session and Welfare & Institutions Code 12301.24 (c) which states, "all current providers shall receive the information described in this section." The statute does not specify that current providers must attend orientation training in-person.

Doug Moore, Executive Director

If it is the intent of the Administration to require current providers to attend orientation training in-person, the ACL should contain information on how providers will be paid their normal hourly wage for this mandatory training.

Federal regulations (29 CFR 785.27) provides that, in order for time spent at training NOT to be considered work time (and, therefore, not compensated), it must meet the following four requirements:

- (1) Attendance is outside of the employee's regular working hours;
- (2) Attendance must be voluntary;
- (3) The employee must not do any productive work while attending; and
- (4) The training should not be directly related to the employee's job. It is considered as directly related if it helps the employee in handling his or her present job better (as opposed to training for a future job).

The draft ACL indicates that in-person attendance at orientation training is mandatory for both current and prospective providers. Therefore it shall count as work time and all current providers must be paid their normal hourly wage.

Eligibility for Retrospective Payment for Current Providers (page two)

The current wording is confusing by saying on the one hand that providers are not eligible to receive retrospective payment (which is not true) and then saying retrospective payment is possible. We suggest this section to be reworded as follows:

“Current provider may be eligible for retrospective payment for services they have provided before they have completed the enrollment requirements back to the date of the recipient’s eligibility determination.”

Revised SOC 426 (page two, sixth paragraph)

The draft ACL states, “W&IC 12305.85 requires that current and prospective providers supply their current physical address, rather than a post office box address, when completing the provider enrollment form.”

Comment: This sentence does not include the process authorized in Welfare and Institutions Code 12305.85 (b) to use a post office box. The sentence should be reworded as follows:

“W&IC 12305.85 requires that current and prospective providers supply their current physical address, rather than a post office box address, when completing the provider enrollment form. The county may approve a written or oral request from the provider, which shall include an explanation of the circumstances that make the use of a post office box appropriate or necessary. The county shall document an oral request received pursuant to this subdivision the provider’s request and the county’s approval or disapproval shall be retained in the provider’s file.”

Prohibitions for Individuals Enrolling as Providers

The draft ACL continues to err in establishing new prohibitions for individuals to enroll as IHSS providers. The draft states, “Under certain circumstances, Medicaid/Medi-Cal rules prohibit an individual from being a provider if he/she has:

- (1) Ever been a licensed health care provider who was suspended from the Medicare or Medicaid/Medi-Cal programs;
- (2) Ever lost or surrendered his/her professional license or certificate to provide health care; or
- (3) Ever had her/her professional license or certificate disciplined by any licensing authority.

COMMENT: IHSS providers are not required to be licensed or certified and this has no relevance to enrolling as an IHSS provider. There is no statutory authority to request this information. Welfare and Institutions Code 12305.81(a) does not contain any authority for CDSS to require IHSS providers to provide information about their current or previous status as a Medi-Cal or Medicaid providers. Moreover, this is irrelevant to any person's ability or authority to serve as an IHSS provider.

The draft ACL also says that a subsequent ACL will be issued about misdemeanor crimes and licensure conditions that would make an individual ineligible to be an IHSS provider.

COMMENT: The Administration does NOT have any authority to unilaterally impose a list of non-exempt crimes (beyond those contained in Welfare and Institutions Code 12305.81 (a)) that would bar any individual from serving and being paid as an IHSS provider. The Administration is clearly attempting to undermine one of the core rights of consumers: to hire, fire and supervise the worker of their choice. Current law only restricts consumers from hiring an individual who has been convicted within the past 10 years for fraud against a government health care or supportive services program and/or felony child, elder and dependent adult abuse.

While we contend that the Administration is attempting to impose these requirements without any statutory authority, we insist that the ACL contain the specific list of felonies and misdemeanors that CDSS intends for counties to use in determining individuals to be ineligible for serving as a provider.

Timeline for Implementation (page 3 and 4)

On page 4, the draft states, "Counties will have the flexibility to develop implementation schedules and processes which meet their individual needs, provided that the requirements are met for all providers by July 1, 2009."

COMMENT: There is no authority for counties to establish separate deadlines for providers to comply with the provisions of ABX4 4 or ABX4 19. We strongly object to any effort of the state and/or counties to impose earlier deadlines on providers to complete criminal background checks or mandatory orientation training. Any such effort would seriously undermine consumer rights, provider rights and state-wideness standards.

County Responsibilities (page 4, bullet #6)

The draft ACL states that county staff will be required to file the original SOC 426, along with photocopies of ID and any other documents in either a provider file (if a county maintains separate provider files) or the recipient's case file.

COMMENT: ABX4 19 clearly establishes that counties are required to have separate provider files in Welfare & Institutions Code 12301.24 (d), 12301.25 (c), and 12301.85 (b). The ACL should be revised to meet these requirements and delete all references to co-mingling provider documents in the recipient's case file. We note the same error was made in the draft ACL section on "File Maintenance" on page 7.

This section should also include information pertaining to contract agencies to ensure their compliance with enrollment procedures. If the contract agency does not use the new form or meet any other requirements that would otherwise fall to the county for individual providers, the contract mode provider should not be held responsible.

Validity Period (page 5)

The draft ACL indicates that a provider may submit changes of address or telephone on a simplified form that may be utilized by the county in lieu of requiring the provider to complete a new SOC 426. We believe the simplified form for these changes should also include name changes so that providers do not have to submit a new SOC 426 if they get married, divorced, etc.

The draft ACL also states that the SOC 426 will remain valid for one year beyond the time that an individual stops providing services. We believe that the ACL should contain clearer definitions of what constitutes a current provider from a prospective provider that could be used for meeting orientation training and other requirements to serve as a provider.

New SOC 426 A (page 5)

The last sentence in the first paragraph in this section should be revised as follows:

“The recipient must sign (NOTE: The parent provider of minor children under age 18 or authorized representative may sign as long as the authorized representative is NOT the provider.) the certification at the bottom of the page to acknowledge that he/she understands and agrees that:

Appeals Process (pages 6 & 7)

The third sentence in the second paragraph should be revised as follows:

“Consistent with W&IC Section 14043.65, the applicant individual will have 60 days from the date of the county’s notification of denial to request the appeal, and the PEAU will have 90 days to provide a decision to the applicant individual.

COMMENT: The majority of SOC 426 forms that will be submitted will be from current providers who are not “applying” to be providers.

The draft ACL states that counties are to provide the PEAU with copies of the completed SOC 426 as well as the Criminal Offender Record Information (CORI) records from the Department of Justice.

COMMENT: There is no statutory authority for the counties to submit copies of these records to PEAU. Penal Code Sections 11105 and 13300 identify who may have access to criminal history information and under what circumstances it may be released. The retention and sharing of CORI records between employing and licensing agencies are strictly prohibited. The retention and sharing of information infringe upon the right of privacy as defined in the California Constitution, and fails to meet the compelling state interest defined in *Loder v. Municipal Court (1976) 17 Cal. 3d 859*.

The draft ACL **must** include provider rights to review and correct their DOJ records as mandated in Welfare & Institutions Code 12301.6 (e)(2)(B) and 12305.86 (c)(1), as follows.

12305.86 (c) (1) If an applicant or provider is rejected as a result of information contained in the criminal background report, the applicant or provider shall receive a copy of his or her own criminal history record from the Department of Justice, as provided in Article 5 (commencing with Section 11120) of Chapter 1 of Title 1 of Part 4 of the Penal Code, to review the information for accuracy and completeness. The applicant or provider shall be

advised that if, upon review of his or her own criminal history record, he or she finds the information to be inaccurate or incomplete, the applicant or provider shall have the right to submit a formal challenge to the Department of Justice to contest the criminal background report.

UDW Comments on Forms & Other Documents:

Provider Enrollment Form (SOC 426)

- The SOC 426 should contain the full list of felony and misdemeanor crimes that could be used to prohibit an individual from enrolling as a provider.
- Under Part A: Provider Information: Item #4 on home address must include the ability to provide a post office box if the county has approved the request from the provider pursuant to Welfare & Institutions Code 12305.85 (b).
- Under Part C: Provider Declaration, "IF I AM ENROLLED BY THE COUNTY AS AN IHSS PROVIDER, I UNDERSTAND AND AGREE THAT – I will be considered to be a Medi-Cal provider of personal care services." This sentence assumes all IHSS cases receive Medi-Cal funding, which is wrong. There are still Residual Cases and not all providers are automatically deemed to be Medi-Cal providers. Hence, this sentence should be revised.

FAQ's about the SOC 426 (New form SOC 426B of 9/15/09)

- Question #3 should delete the reference to return the form to the county Public Authority. While a number of counties may delegate or share this responsibility with its Public Authority, this may not be a uniform practice. The FAQ's document should only contain instructions and advice that applies in all counties.
- Question #9 should include the full list of felonies and misdemeanor crimes that would prohibit an individual from enrolling as an IHSS provider.
- Question #10 and the answer should be deleted. There is no statutory authority to require providers to submit a new SOC 426 within 35 days of the conviction of a non-exempt crime. Moreover, this information will be disclosed to the county through the regular DOJ/CORI process.

Procedures for Reviewing the SOC 426

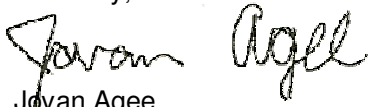
- Item IV (SOC 426 #11) and Item V (SOC 426 #12), we object to the requirement to deem individuals ineligible to be IHSS providers if they have not been reinstated as a Medicare, Medicaid or Medi-Cal provider. There could be legitimate reasons why an individual may not have requested to have their license reinstated or restored.

Notices of Incomplete Forms

- The timelines on these draft forms are inconsistent and should all be revised to grant providers 60 days to appeal any decision that deems them ineligible to serve as an IHSS provider.

We appreciate this opportunity to provide comments to this draft All-County Letter. Given the short timeframe, we have done our best to submit meaningful suggestions and questions by your deadline of September 24, 2009. However, we may find it necessary to submit additional comments after further review of the CDSS draft and related documents.

Sincerely,

A handwritten signature in black ink that reads "Jovan Agee". The signature is written in a cursive, flowing style.

Jovan Agee,
Political & Legislative Director

cc: Myesha Jackson, Office of the President Pro Tempore
Gail Gronert, Special Assistant, Assemblywoman Speaker Bass
Nicole Vazquez, Consultant, Assembly Budget Committee
Jennifer Troia, Consultant, Senate Budget Committee