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*California's protection and advocacy system*

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September 21, 2009

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

Dear Mr. Shiroy,

Disability Rights California, a non-profit advocacy organization mandated to advance the human and legal rights of people with disabilities, is deeply concerned about the "final" IHSS provider enrollment form and the process by which it was created.

As part of the IHSS coalition, we participated in the stakeholder process and signed the letter on behalf of the coalition last May. That letter reflected analysis of what was proffered as the state's draft. After the stakeholder meeting, we received no response to the coalition's written comments or to the oral comments of the stakeholders at the meeting.

Then we received a "final" draft in July which includes items not on the earlier draft, with no further stakeholder input requested.

We support the range of concerns raised by CWDA, CAPA, SEIU and UDW about the length and complexity of the form, its inaccuracies and its overreaching requirements. We hope to see a form which is understandable to the providers, with straightforward language, no extraneous questions, and no prohibitions, warnings or requirements without basis in statute. We want to see a form which reflects the range of literacy and language among the workers.

The most egregious addition to the form is the statement that conviction for “any fraud” or some (unspecified) misdemeanors bars a potential IHSS worker from being able to work. We have heard two assertions: that Medicaid statute requires this policy; and that this restriction is applied to all other Medicaid providers. We disagree with both assertions.

The IHSS statutes create specific provider enrollment requirements which override the general requirements that California Department of Health Care Services is trying to incorporate into the form. The Legislature has spent considerable time, as recently as two months ago, considering the requirements for IHSS workers. If the Legislature had intended the general requirements to apply to the IHSS program it would have provided for that in statute. Instead, the Legislature enacted specific statutes that relate only to IHSS providers. These specific statutes contain requirements that are in conflict with the general statutes. For example, the IHSS statutes do not require disqualification of a provider for conviction of a misdemeanor.

The Legislature did not intend to create a conflict in the statutes. The only way to avoid a conflict is to construe the statutes so the specific IHSS statutes are controlling. This interpretation is in accordance with the canons of statutory construction generally applied by the courts, i.e., that in the event of a conflict, the more specific and more recent statute controls.

In addition, the statutes relied on by California Department of Health Care Services govern providers who submit reimbursement requests directly to the state. Those statutes do not govern providers who are employed directly by Medi-Cal beneficiaries, and who are paid wages for services on the behalf of the beneficiaries. Applying the general provider statutes in this situation would interfere with the employer-employee relationship by imposing requirements that may make sense when licensed providers are receiving third party reimbursement, but do not make sense when there is an employer-employee relationship involved. This relationship is governed by employment laws rather than licensing laws, fee-for-service reimbursement laws, or some other fee schedule or capitated payment law.

The CDHS proposal, if implemented, would represent interference with contract and interference with prospective economic advantage in that it would cause employees of IHSS recipients to quit or would prevent IHSS recipients from hiring qualified employees. There is nothing in the IHSS statutes or the general labor statutes that authorizes the type of

interference that California Department of Health Care Services proposes.

Finally, there is nothing in federal law that requires that the same disqualification provisions apply to all providers. The purpose of the disqualification provisions are to prevent fraud. These provisions may be justified when a licensed provider is billing Medi-Cal for services provided to a third party. They are not necessary when payment is made at an hourly rate on behalf of the employer of the provider. There is already a complex administrative system in place to prevent fraud in this circumstance, namely the county welfare department administrative system and the state payrolling system. Moreover, there are laws that protect recipients such as the elder and dependent adult abuse statutes. An additional layer of requirements is not necessary.

As to the assertion that the same requirements are made of all Medi-Cal providers, the pertinent section of the general Medi-Cal provider agreement does not support this.

DHCS 6208 (rev. 2/08), the Medi -Cal Provider Agreement, asks three questions about three types of felonies and misdemeanors. If *any* felony would bar enrollment, the second and third inquiries would be unnecessary.

**17. Provider Fraud or Abuse Convictions and/or Civil Fraud or Abuse Liability.** Provider certifies that it and its owners, officers, directors, employees, and agents, has not: **(1) been convicted of any felony or misdemeanor involving fraud or abuse in any government program, within the last ten years; or (2) been convicted of any felony or misdemeanor involving the abuse of any patient; or (3) been convicted of any felony or misdemeanor substantially related to the qualifications, functions, or duties of a provider; or (4) entered into a settlement in lieu of conviction for fraud or abuse, within the last ten years; or, (5) been found liable for fraud or abuse in any civil proceeding, within the last ten years.**

DHCS 6216, the Statement/Agreement For Physician/Allied/Dental Providers, also asks about convictions, but does not state that ANY conviction will bar enrollment. Instead, it says: **All convictions are reviewed. If the conviction prevents certification, the applicant and employer (if known) will be notified.**

We request that CDSS respond in writing to the concerns raised by all the stakeholders. We further request that CDSS reconvene the stakeholder group, including legislative staff, advocates and consumers, before it issues the final letter. 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 large, sweeping initial "D".

Deborah Doctor  
Legislative Advocate

Dan Brzovic  
Associate Managing Attorney  
Bay Area Regional Office