



IHSS Coalition

QUALITY CARE BEGINS AT HOME

April 22, 2009

Brad Elftmann, Analyst
Policy, Legislation & Litigation Unit
Adult Programs Policy Bureau/Adult Programs Branch
California Department of Social Services
Via E-mail: brad.elftmann@dss.ca.gov

RE: Draft IHSS Provider Enrollment Form

Dear Brad;

The undersigned organizations are members of the IHSS Coalition and would like to express serious concerns regarding changes proposed by the California Department of Social Services (CDSS) in the redesign of the *Medi-Cal Provider Enrollment Form* (MPEF). In-Home Supportive Services (IHSS) is a statewide public program providing essential personal care and domestic services to aged, blind or disabled Californians who are unable to remain safely in their own homes without such assistance. As of December 2008, there are approximately IHSS 440,000 consumers and 376,000 providers.

Proponents of the social services model of IHSS (versus the medical model) have questioned whether changes in the form are required and have repeatedly requested explanation. This includes the California Association of Public Authorities (and individual Public Authorities), union representatives of IHSS workers, and county representatives—whose already stretched staffs would be saddled with administering completion of this complex form. Issues about length and content, process, and resources necessary for implementation are all underlined by the question of timing—since federal Medi-Cal funding has matched state and local funding since April 1993.

Before delving into specifics, important aspects of the unique nature of IHSS and the Public Authorities need to be reviewed. These points are the driving philosophy behind the IHSS program, inherent in its design, and are too often forgotten in any bureaucratic process. They are at the heart of our opposition to the draft MPEF.

IHSS is a consumer-directed program. While the state and Public Authorities have distinct employer responsibilities, the consumer is the legal employer of the worker they choose, train and supervise (which may include family members). Tasks performed are authorized by a county social worker after an assessment of monthly service hours



needed to live safely in one's own home. Timesheets are co-signed by each consumer and worker to validate completion of the authorized tasks. IHSS is in fact considered the national model for all such self-directed programs for the aging and people with disabilities. Most notable of these is the successful Medicaid waiver *Cash & Counseling* program, which has been expanded to 15 states.

Augmentation of consumer services is available through the state's network of IHSS Public Authorities. These provide a registry to assist consumers in finding providers, plus provide worker training and background checks. Public Authorities also serve as the entity responsible for collective bargaining with labor unions which represent providers.

As with any system, there is an opportunity for exploitation. But the flexibility of IHSS which allows consumers maximum control over their independent living is legitimately needed. The dignity and quality of life it allows for almost half a million Californians should not be marginalized for the few that break trust with the system to benefit themselves illegally.

Unfortunately, the proposed MPEF threatens the notion that the IHSS consumer can best manage the worker they choose to provide some of the most intimate services possible. Further, it confirms the initial fears that utilization of Medi-Cal funding would lead to "medicalization" of the IHSS program and undermine the consumer autonomy that is the framework of the program.

We need to seriously re-examine the presumption that certification and licensing automatically result in better care. The more important concerns are: a) ensuring our state remains a leader in cost-effective delivery of domestic and personal assistance services for the growing population which requires the assistance; b) committing to not abandoning those who cannot afford paying privately for home care; and c) refusing to undermine the civil rights of people with disabilities to live in the community by forcing them into unnecessary and expensive last resorts such as licensed agencies or nursing homes.

We certainly understand CDSS staff is proud that the proposed five-page provider enrollment form is an improvement over the 21-page form DHCS requires of doctors, hospitals and nursing homes. Nevertheless, we need to address major points that are based on citations to legal authority that are being used to justify the proposed MPEF draft:

The federal law they rely on (CFR 455.104-.106) is clearly directed to "provider agreements" entered into by agencies and entities. It refers to information that must be disclosed by the *entity* provider "to the State survey agency at the time it is surveyed." [455.104(b)(1)(a)]. Further, under this section, "Updated information must be furnished to the Secretary of State or the State survey or Medicaid agency at intervals between recertification or contract renewals, within 35 days of a written request." [455.104(b)(3)] Surely, neither the Secretary of State nor Licensing and Certification want to receive



new provider contracts or updates from over 375,000 individual IHSS home care workers.

CFR Section 455.106 does refer to disclosure of information “of any person” entering into or renewing a provider agreement. But then it goes on to specify that it is “...any person who: (1) Has ownership or control interest in the provider, or is an agent or managing employee of the provider; **and** (emphasis added) (2) Has been convicted of a criminal offense related to that person’s involvement in any program under Medicare, Medicaid, or the title XX services program since the inception of those programs.” [455.106(a)] Again, this section does not seem to contemplate an individual independent contractor. It addresses a professional relationship that is in fact the largest arena of fraud in Medi-Cal: persons who work as employees in large entities, such as hospitals, nursing facilities, health care clinics or home care agencies. These individuals sometimes perpetrate theft of huge amounts of government dollars in those situations. Since each IHSS consumer is the employer of their individual IHSS provider, it does **not** seem to have been contemplated under this federal statute.

Reading the sections of California law upon which CDSS says they have relied to change the MPEF, we note that the state does refer to individuals as “applicants” to become Medi-Cal providers. [W&I Code Section 14043, et seq.] However, that same section links the definition of “provider” to 14043.1(e) entitled “Business address”, which again seems to imply an agency or larger business entity – not independent providers of home care services.

Further on, in section 14043.15, the statute permits the department to “adopt regulations for certification” and sets up an exceptional certification process for different provider groups. Admittedly, the structure of IHSS public authorities and the division of employer role among the consumer, the local public authority and the State Controller is complex. But it has been working quite well since the mid-1990’s. In fact, IHSS public authorities worked so well in a few counties in the 1990’s that the state shifted from *permitting* them to making entities such as public authorities *mandatory* in each county as of January 1, 2003. Has this unique IHSS structure been adequately explained to the federal government? We would propose that CDSS seek an exception to normative Medi-Cal provider approval processes when the provider is to be an IHSS home care worker.

Under the State Plan Amendment approved by the federal government effective April 1, 1994, and title “Reimbursement for Medi-Cal Personal Care Services”, IHSS public authorities are identified as Medi-Cal Providers. The pertinent section states [TN. No. 94-006, F. (3)]:

*Within the meaning of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the California Government Code relating to collective bargaining by employee organizations that include employees of a public agency, any public authority created pursuant to this section is deemed to be the employer of persons referred to recipients to provide personal care services and is also **deemed to be the Medi-Cal provider of***



record. (emphasis added).

Although in response to our request for citations to all legal authority upon which they relied, CDSS did not initially list W&I Code section 12305.81, which they have since cited as giving them authority to change the MPEF. That statute was enacted in SB 1104 (Chapter 229, Statutes of 2004) as part of the Quality Assurance Initiative. WIC 12305.81 requires the CDSS to update the IHSS Provider Enrollment Form that each IHSS provider must sign under penalty of perjury and requires the revised IHSS Provider Enrollment Form to include statements that individuals are ineligible to be enrolled as an IHSS provider for 10 years following their conviction or incarceration of elder abuse, child abuse, and fraud against IHSS and other government-funded health programs. While this section does give authority for CDSS to seek documentation of *some* of the information enumerated in the proposed MPEF, we contend that the lengthy form is more than required by this state law.

In conclusion, while our legal research may not be exhaustive, our review seems to reveal that in fact California has quite a bit of discretion when it comes to determining the content and process related to giving Medi-Cal provider status to the IHSS workforce. Additionally, under the U.S. Supreme Court *Olmstead* decision, both California state and local governments are under legal obligation to expand the availability of home and community-based services in the most integrated settings for people with disabilities. In our view, the CDSS's draft MPEF violates this legal responsibility, because it will make it more difficult for IHSS consumers to find and hire workers of their choice.

Our request is to have a face-to-face discussion with both CDSS and DCHS staff who can fully explain the rationale for and legal underpinning for this draft MPEF. The IHSS Coalition would be pleased to identify some representatives to thoroughly discuss this issue. As it currently stands, we seriously question the necessity to change the process that has been in place for IHSS receiving Medi-Cal funds since 1993. If our cursory analysis of the law is incorrect and a different MPEF is currently required, we would support:

- *Submission of an urgent request to the federal Centers for Medicare and Medicaid Services (CMS) for an exemption, due to the unique structure of IHSS and the anticipated negative impact that this change would have on the nearly ¾ of a million people directly affected by IHSS (440,000 consumers, 376,000 home care workers);*
- *Development of less onerous procedures to accomplish the required purpose (for example, couldn't a sentence or two on the pay stub alert IHSS workers to what the legal obligation of being a Medi-Cal provider means?); or*
- *Enactment of an amendment to the state law (W&I Code section 12305.81), which seems to be the primary legal authority for the current draft MPEF.*



IHSS Coalition re: DRAFT IHSS Provider Enrollment Form

Sincerely,

John Wilkins, IHSS Coalition Chair (Fresno IHSS Consumer)
AARP-California
California Alliance for Retired Americans (CARA)
California Association of Public Authorities for IHSS (CAPA)
Californians for Disability Rights, Inc. (CDR)
California Disability Community Action Network (CDCAN)
California Foundation for Independent Living Centers (CFILC)
California In-Home Supportive Services Consumer Alliance (CICA)
California Senior Legislature
California United Homecare Workers (CUHW)
Congress of California Seniors
Disability Rights California (formerly Protection & Advocacy, Inc.)
Gray Panthers California
Herbert M. Meyer, Consumer of IHSS Services, Marin County.
IHSS Public Authority of Marin County
Independent Living Services of Northern California
Marin Center for Independent Living
Nevada Sierra Regional IHSS Public Authority
Northern California ADAPT
Older Women's League California (OWL)
Personal Assistance Services Council of Los Angeles County
Resources for Independent Living
San Francisco IHSS Public Authority
Service Employees International Union – State Council:
 SEIU United Long Term Care Workers
 SEIU United Healthcare Workers West
 SEIU Local 521
Silicon Valley Independent Living Center (SVILC)
United Domestic Workers of America/AFSCME
Western Center on Law & Poverty

cc: Members, Assembly Budget Subcommittee #1
Nicole Vazquez, Consultant, Assembly Budget Committee
Gail Gronert, Office of The Honorable Karen Bass
Julianne Huerta, Consultant, Assembly Republican Fiscal Office
John Wagner, Director, Department of Social Services
Patricia Huston, Department of Social Services
Mike Wilkening, Department of Finance
Ginni Bella, Legislative Analyst's Office