



## CDCAN REPORT

**#316-2009 NOVEMBER 25, 2009 (EARLY WEDNESDAY)**

**CALIFORNIA DISABILITY COMMUNITY ACTION NETWORK**

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**ACCOUNTABILITY WITH ACTION**

*California Disability Community Action Network Disability Rights News goes out to over 50,000 people with disabilities, mental health needs, seniors, traumatic brain & other injuries, veterans with disabilities and mental health needs, their families, workers, community organizations, including those in Asian/Pacific Islander, Latino, African American communities, policy makers and others across California.*

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### **State Budget Crisis:**

## **SUPERIOR COURT JUDGE ISSUES TEMPORARY ORDER STOPPING STATE FROM IMPLEMENTING IHSS WORKER FELONY CONVICTION REQUIREMENTS**

***Order Remains In Effect Until January 29<sup>th</sup> Alameda County Superior Court Hearing – Another Major Setback for Schwarzenegger Administration***

SACRAMENTO, CALIF (CDCAN) [Updated 11/25/09 01:20 AM (Pacific Time) - A California Superior Court Judge temporarily stopped – at least until another court hearing January 29<sup>th</sup> – the Schwarzenegger Administration from proceeding further with new rules that would prevent persons with a felony conviction from applying for or continuing to work as an In-Home Supportive Services (IHSS) worker (provider).

The temporary state court order issued by Alameda County Superior Court Judge Frank Roach Tuesday afternoon (November 23) only impacts the new IHSS worker requirements dealing with felony convictions – but the court order applies to all persons statewide applying for or who are currently employed as IHSS workers for the over 460,000 persons with disabilities, mental health needs, the blind and seniors who receive services under the program.

The temporary restraining order remains in effect until a hearing scheduled for January 29, 2010 at 09:00 AM at the Rene C. Davidson Alameda County Courthouse, Department 31, in Alameda. The Schwarzenegger Administration, represented by the California Department of Justice, would have to provide evidence and arguments (show cause) why the court should not grant the requests made by those filing the lawsuit to permanently stop the State from implementing the requirements that would prevent a person with a felony conviction from applying for or remaining an IHSS worker (provider). The court could decide to continue the temporary order or issue it as a permanent court order.

The new rules dealing with felony convictions were part of several new requirements passed as part of the 2009-2010 revised state budget in late July for IHSS workers.

### **Major Setback for Schwarzenegger Administration**

The temporary order – which could be reversed or changed in some other way after the January 29<sup>th</sup> court hearing – is yet another setback for the Schwarzenegger Administration trying to implement a wide range of budget reductions impacting health and human services for persons with disabilities, mental health needs, the blind and seniors and IHSS workers. Many advocates opposed the new requirements either in how it was being implemented or that it would cause major problems in finding or keeping low paid IHSS workers. Others opposed the new requirements as implemented by the State as too restrictive and unfair to persons who may have had legal problems in the past. The court order is seen as at least a temporary victory for thousands of IHSS recipients and workers and advocates.

The Schwarzenegger Administration and the Legislature controlled by Democrats, passed as part of the budget agreement, the new IHSS worker requirements – including mandatory fingerprinting, criminal background checks, as means to reduce fraud and abuse in the program. Since then, some legislators have raised concerns on how those requirements were being implemented, after hearing of complaints and protests from nearly half the State's counties and from advocates.

### **Several Lawsuits Filed To Stop Budget Cuts**

Several different lawsuits – including those filed in federal court – have been successful in stopping – at least temporarily – budget cuts and service reductions impacting other areas of the IHSS program (state funding for IHSS worker wages and changes in eligibility and services based on an assessment tool using the “functional index score” and “functional index ranking” of tasks for IHSS recipients), Adult Day Health Care, and last year's Medi-Cal provider (including pharmacy) reductions.

Other lawsuits – including two seeking to reverse the Governor's line item vetoes made to the revised budget passed in late July and several seeking to stop the state worker furloughs, are pending in state courts.

Other lawsuits – both in state and federal court – are either being considered or will be soon filed dealing with cuts to Medi-Cal pharmacy providers and possibly other requirements not covered by pending lawsuits dealing with IHSS workers and recipients.

### **Lawsuit Claims Felony Requirements for IHSS Workers Violates State Constitution**

- The lawsuit *Ellis v. Wagner* (case No. RG09484051) filed November 12, 2009 in Alameda County Superior Court by Peter Sheehan of the Social Justice Law Project based in Oakland on behalf of 7 IHSS workers and 1 IHSS recipient claimed that the new State requirements regarding felony convictions was an “unlawful policy and practice” that will “cause irreparable harm and injury to” the IHSS workers and recipient filing the lawsuit by preventing a person convicted previously of a felony from serving as an IHSS worker.

- The lawsuit claims that the requirement would result in IHSS recipients from obtaining new or maintaining existing IHSS workers and that such a loss would lead to “decline in mental functioning or health” and institutionalization.
  - The lawsuit claims that the new requirements regarding felony convictions is not required by federal or California law and is “unauthorized, and violates” California Welfare and Institutions Code Section 12301.6 and the equal protection and due process provisions of the California Constitution saying that “To the extent that any provision of California law authorizes or requires permanent exclusion of persons convicted of any felony from IHSS provider status, that provision is unconstitutional under the equal protection and due process guarantees of the California Constitution.”
- [CDCAN Note: “Ellis” is Gail Ellis, an IHSS worker from Salinas and one of the 7 IHSS workers and one IHSS recipient who filed the lawsuit. “Wagner” refers to John Wagner, the director of the Department of Social Services, the state agency that oversees the IHSS program statewide who was named as one of the two defendants (the other being David Maxwell-Jolly, director of the Department of Health Care Services, which oversees the Medi-Cal program for the state. Nearly all of the services under IHSS is matched with Medicaid – called Medi-Cal in California - dollars). A copy of the lawsuit filed is on the CDCAN website at [www.cdcan.us](http://www.cdcan.us) ]

### **What Does the Temporary Restraining Order Mean?**

#### What IHSS Worker Requirements Are Stopped By This Order:

- At least until the “Order to Show Cause” hearing on January 29, the temporary restraining order stops the State from implementing the new requirements for IHSS workers dealing specifically with felony convictions, as outlined in an official notification to the counties from the Department of Social Services, called an “All County Letter”, sent out October 1, 2009.
- That “All County Letter”, ACL-09-52, covers several different IHSS worker (provider) changes [copy of this All County Letter is on the CDCAN website at [www.cdcan.us](http://www.cdcan.us) ].
- The court order stops – temporarily at least until the January court hearing – the State from implementing those requirements dealing with felony convictions.
- It means that at least until the January 29<sup>th</sup> court hearing, the State and counties that implement the IHSS program locally, cannot prevent a person who may have a felony conviction, from applying or becoming an IHSS worker.
- It means that, at least until the January 29<sup>th</sup> court hearing date, the State must stop using the new IHSS provider (worker) enrollment forms that require signing under penalty of perjury disclosure of any felonies.
- The court order – at least until the January 29<sup>th</sup> hearing date – presumably requires the Schwarzenegger Administration (the Department of Social Services) to notify the counties, IHSS workers and recipients of this temporary order.

#### What IHSS Worker Requirements Are NOT Impacted By This Order:

- Other new IHSS worker requirements – which are not part of the Ellis v. Wagner lawsuit – are not stopped by this temporary restraining order.
- There may be other lawsuits filed dealing with other aspects of the IHSS worker requirements, including other parts of the required background checks and

fingerprinting, and possibly the requirement of unannounced home visits to IHSS recipients.

#### What Other IHSS Changes Not Impacted By This Order:

Other reductions to the IHSS program dealing with cuts to eligibility and services using an assessment tool known as the “functional index score” and “functional index rankings” and a cut in state funding toward IHSS worker wages (known as “state participation”) were stopped by two separate federal lawsuits in late June and in October.

#### **Who Does This Impact?**

- All persons currently working as an IHSS worker (provider) or all persons applying to be an IHSS worker across the state are covered by the temporary court order. The temporary court order requires the State to notify these persons of the temporary order.
- All of the over 460,000 children and adults with disabilities, mental health needs, the blind, seniors who receive services under IHSS. These include persons with developmental disabilities who may also receive regional center community-based funded services. The temporary court order requires the State to notify these persons of the temporary order.
- All counties who administer the IHSS program locally who will have to implement the temporary court order, after receiving notification from the State (the Department of Social Services) as required by the temporary court order.
- Department of Social Service and Department of Health Care Services – who must implement the temporary court order.

#### **What Does the Lawsuit Ask The Court To Do?**

- Asks that the state superior court issue an “*alternative or peremptory writ*” (a final court order) that would order the Schwarzenegger Administration to “*rescind and set aside*” the State’s policy in the All County Letter (ACL) 09-52, that “*persons convicted of a felony at any time are ineligible to become or remain IHSS providers [workers]*” and to “*immediately issue to County Welfare Directors and all IHSS providers and recipients a notice informing them of this change in policy and informing them that the mandatory conviction disqualification provisions for IHSS providers are limited to the convictions specified in Section 12301.6 [of the California Welfare and Institutions Code] and that any actions taken on the basis of the policy reflected in ACL 09-51 are null and void and must be set aside.*”
- Asks that the state superior court issue an “*alternative or peremptory write*” (a final court order) that would order the Schwarzenegger Administration to “*rescind and set aside*” the State’s policy in the All County Letter (ACL) 09-52 and SOC-426 that “*persons seeking [IHSS] provider [worker] status are required to disclose whether they have ever been convicted of a felony and immediately issue to County Welfare Directors and all IHSS providers and recipients a notice informing them of this change in policy and informing them that the [IHSS] provider enrollment form (SOC-426) attached to ACL 09-52 is incorrect and should not be used and that persons disqualified from [IHSS] provider status or discouraged from applying for provider*

*status due to the mandatory conviction exclusion should be contacted and advised that the disqualification was incorrect.”*

- Asks that the state superior court issue, pending a final judgment, issue a “*writ of mandate*” (court order) that stops (enjoins) the Schwarzenegger Administration (respondents) from “*continued enforcement of the policy of disqualifying all persons convicted of a felony from [IHSS] provider status and from continued use of SOC-426*”.
- Asks also for reasonable attorney fees and costs.

### **Who Filed The Lawsuit?**

Peter Sheehan, attorney, of the Social Justice Law Project, based in Oakland.

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The Social Justice Law Project filed the lawsuit on behalf of 7 IHSS workers and 1 IHSS recipient:

- Gail Ellis of Salinas, an IHSS worker for her son who has developmental disabilities for the past 16 years, who in 1993 was convicted of a felony (grand theft) and other than the arrest leading to this conviction has not been arrested or convicted of any other offense, according to the lawsuit filed.
- Alberta Bachman, age 66, an IHSS worker for past 20 years, and for the past 3 years an IHSS worker for her 90 year old mother in Sacramento. Bachman was in 1976 convicted of a felony (grand theft) but has not been arrested or convicted since then, according to the lawsuit filed.
- Ryan Hall of Alameda County and an IHSS worker for 5 years, was convicted in 2004 of a felony, third degree assault in the State of Washington while on a short trip there and sentenced to 18 months probation completed in Alameda County. The IHSS recipient who Hall worked for – and continues to work for – Mark Beckwith, was aware of the conviction and wrote a letter to the court in Washington on Hall’s behalf, according to the lawsuit filed.
- Mark Beckwith of Alameda County, age 52 and has received services under IHSS for the past 30 years. Has significant physical disabilities and does not want to lose Ryan Hall as his IHSS worker, according to the lawsuit filed.
- Rick Molnar of Long Beach, an IHSS worker for the past 5 years for a personal friend of over 20 years, who is recovering from a stroke. Molnar was convicted in 1969 or 1970 what was then considered a felony – possession of marijuana. Other than this conviction and a misdemeanor conviction in 1979 for driving under the influence, Molnar has not been convicted or arrested for any other offense, according to the lawsuit filed.
- Jerome Brouard, of Long Beach and has been an IHSS worker for his mother for the past 5 years. In 1997 he was involved in an altercation and convicted of a felony, assault with a deadly weapon and placed on probation which he completed and has not been convicted or any other offense since then, according to the lawsuit filed.
- Christine Adams of Fresno has been an IHSS worker for her mother, who has significant disabilities, for more than 7 years. When Adams was 19 (prior to 1984),

she was convicted of a felony – vehicular manslaughter with gross negligence, after drinking and crashing a car into a tree resulting in the death a friend, with whom she had been drinking with. She completed 3 years probation and performed 500 hours of community service, according to the lawsuit filed.

- James Moss of Joshua Tree has been an IHSS worker for over 8 years and currently works for 2 persons who are authorized (in total) about 60 hours a month under the IHSS program. Moss is seeking additional persons to work for but, according to the lawsuit filed, cannot find employment as an IHSS worker for other recipients because the State's new IHSS worker (provider) enrollment form must be completed when acquiring work with a new IHSS recipient – and that form requires a statement, under penalty of perjury, that the IHSS worker (applicant) has never been convicted of any felony crime. Moss, in 1999, was convicted of a felony – receiving money under false pretenses but has not been arrested or convicted of any other crime since then, according to the lawsuit filed.

## **REMEMBERING THE LIVES OF EDWARD M. KENNEDY, EUNICE KENNEDY SHRIVER, JOAN B. LEE, DONALD ROBERTS & BILL YOUNG.**

### **URGENT!!!!**

#### **PLEASE HELP CDCAN CONTINUE ITS WORK!!!**

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To continue the CDCAN website, the CDCAN News Reports. sent out and read by over 50,000 people and organizations, policy makers and media across California and to continue the CDCAN Townhall Telemeetings which since December 2003 have connected thousands of people with disabilities, seniors, mental health needs, people with MS and other disorders, people with traumatic brain and other injuries to public policy makers, legislators, and issues.

Please send your contribution/donation (make payable to "CDCAN" or "California Disability Community Action Network):

#### **CDCAN**

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MANY, MANY THANKS TO Valley Mountain Regional Center, Toward Maximum Independence, Inc (TMI), Friends of Children with Special Needs, UCP of Los Angeles, Ventura and Santa Barbara Counties, Southside Arts Center, San Francisco Bay Area Autism Society of America, Hope Services in San Jose, FEAT of Sacramento (Families for Early Autism Treatment), RESCoalition, Sacramento Gray Panthers, Easter Seals of Southern California, Tri-Counties Regional Center, Westside Regional Center, Regional Center of the East Bay, UCP of Orange County, Alta California Regional Center, Life Steps, Parents Helping Parents, Work Training, Foothill Autism Alliance, Arc Contra Costa, Pause4Kids, Manteca CAPS, Training Toward Self Reliance, UCP, California NAELA, Californians for Disability Rights, Inc (CDR) including CDR chapters, CHANCE Inc, , Strategies To Empower People (STEP), Harbor Regional Center, Asian American parents groups, Resources for Independent Living and many other Independent Living Centers, several regional centers, People First chapters, IHSS workers, other self advocacy and family support groups, developmental center families, adoption assistance program families and children, and others across California

