



CDCAN REPORT

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CALIFORNIA DISABILITY COMMUNITY ACTION NETWORK

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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 Roesch's Detailed Temporary Order Stopping State From Implementing IHSS Worker Felony Conviction Requirements Until January 29th Court Hearing

SACRAMENTO, CALIF (CDCAN) [Updated 11/25/09 10:10 AM (Pacific Time) - Alameda County Superior Court Judge Frank Roesch's detailed temporary restraining order stops the Schwarzenegger Administration from implementing the new requirements that would have prevented persons with any felony convictions from applying for or continuing to work as an In-Home Supportive Services (IHSS) worker, at least until the court hearing on January 29th to hear the case, at the Rene C. Davidson Alameda Courthouse, Department 31 in Alameda. [See CDCAN Report #316-2009 for more details – note correction of Judge's name]

The judge made handwritten changes to the original proposed order submitted by the attorney filing the lawsuit on behalf of 7 IHSS workers and 1 IHSS recipient (a copy of the 2 page pdf file titled "EllisvWagnerOrderAlternative-WritoMandate.pdf") is attached to this report – and also available on the CDCAN website at www.cdcan.us along with the actual original lawsuit that was filed)

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.

The detailed order or "alternative writ of mandate" was signed by the judge November 24th and commands the State of California to do the following immediately:

“(1) Cease using enrollment forms or other documents requiring prospective [IHSS worker or provider] enrollees or applicants to declare that they have never been convicted of a felony crime or serious misdemeanor crime and/or that state that persons convicted of any felony are not eligible to be IHSS providers [workers].

(2) Cease disqualifying, or finding ineligible for IHSS provider [worker] status, persons who are not otherwise disqualified, on the basis that they have been convicted of a felony at some point of their life or have been convicted of a serious misdemeanor crime at some point of their life.

(3) This order does not affect disqualification based on W& I [Welfare and Institutions] Code Section 12305.81 [see below for text of that code section that the Judge’s order does not cover].”

The temporary state court order issued by Superior Court Judge Roesch [note: not Davidson, as reported in the earlier CDCAN Report – thanks to Bruce Mackenzie for the correction!] on Tuesday afternoon (November 24) 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.

Section 12305.81 of the California Welfare and Institutions Code

The following section in the California Welfare and Institutions Code (state law) that was not added or changed by the 2009-2010 revised budget either in February or late July – was not part of the Judge’s temporary restraining order. This section of state law remains in effect, as the Judge’s order indicates. Here is the complete text of that code section NOT impacted by the Judge’s order and STILL in effect:

12305.81. (a) Notwithstanding any other 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 XXI of the federal Social Security Act or a violation of subdivision (a) of Section 273a of the Penal Code, or Section 368 of the Penal Code, or similar violations in another jurisdiction.

The department and the State Department of Health Care Services shall develop a provider enrollment form that each person seeking to provide supportive services shall complete, sign under penalty of perjury, and submit to the county. Submission of the form shall include the photocopying by the county of original documentation verifying the provider's identity, and shall be considered as an application to render services under the Medi-Cal program consistent with subdivision (c) of Section 14043.1. A provider shall submit the form to the county in person, and the county shall retain the form and a copy of the identification documentation in the file of the provider. The form shall contain statements to the following effect:

(1) A person who, in the last 10 years, has been convicted for, or incarcerated following conviction for, fraud against a government health care or supportive services program is

not eligible to be enrolled as a provider or to receive payment for providing supportive services.

(2) An individual who, in the last 10 years, has been convicted for, or incarcerated following conviction for, a violation of subdivision (a) of Section 273a of the Penal Code or Section 368 of the Penal Code, or similar violations in another jurisdiction, is not eligible to be enrolled as a provider or to receive payment for providing supportive services.

(3) A statement declaring that the person has not, in the last 10 years, been convicted or incarcerated following conviction for a crime involving fraud against a government health care or supportive services program.

(4) A statement declaring that he or she has not, in the last 10 years, been convicted for, or incarcerated following conviction for, a violation of subdivision (a) of Section 273a of the Penal Code or Section 368 of the Penal Code, or similar violations in another jurisdiction.

(5) The person agrees to reimburse the state for any overpayment paid to the person as determined in accordance with Section 12305.83, and that the amount of any overpayment, individually or in the aggregate, may be deducted from any future warrant to that person for services provided to any recipient of supportive services, as authorized in Section 12305.83.

(b) The department shall include the text of subdivision (a) of Section 273a of the Penal Code and Section 368 of the Penal Code on the provider enrollment form.

(c) A public authority or nonprofit consortium that is notified by the department or the State Department of Health Care Services that a supportive services provider is ineligible to receive payments under this chapter or under Medi-Cal law shall exclude that provider from its registry.

(d) A public authority or nonprofit consortium that determines that a registry provider is not eligible to provide supportive services based on the requirements of subdivision (a) shall report that finding to the department.

Lawsuit Claims Felony Requirements for IHSS Workers Violates State Constitution

- As reported in an earlier CDCAN Report, 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]

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].
- 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 29th 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 29th 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 29th 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.

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

URGENT!!!!

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MANY, MANY THANKS TO the CALIFORNIA ASSOCIATION OF ADULT DAY HEALTH CENTERS, 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