



CDSS

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**DEPARTMENT OF SOCIAL SERVICES**



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GOVERNOR

September XX, 2010

ALL-COUNTY LETTER (ACL) NO. 10-XX

TO: ALL COUNTY WELFARE DIRECTORS  
ALL IN-HOME SUPPORTIVE SERVICES (IHSS)  
PROGRAM MANAGERS

Reason For This Transmittal

- State Law Change
- Federal Law or Regulation Change
- Court Order or Settlement Agreement
- Clarification Requested by one or More Counties
- Initiated by CDSS

SUBJECT: BECKWITH (ELLIS), et al. v. WAGNER; IHSS PROVIDER  
DISQUALIFYING CONVICTIONS

REFERENCES: ACL NO. 09-52, DATED OCTOBER 1, 2009; ACL NO. 09-70,  
DATED OCTOBER 31, 2009; ACL NO. 09-78, DATED  
NOVEMBER 25, 2009; ACL NO. 10-05, DATED  
FEBRUARY 17, 2010; AND ACL No. 10-35 DATED JULY 16, 2010

This ACL provides counties with the latest information and instructions regarding *Beckwith (Ellis) v. Wagner* lawsuit Case No. RG 09484051. On August 23, 2010, the Alameda County Superior court issued an order prohibiting the California Department of Social Services (CDSS) from reinstating a previous policy which would disqualify individuals who had ever been convicted of a felony or serious misdemeanor crime from being enrolled as providers in the IHSS program. As a result of the recent court ruling, counties are instructed to continue to deem ineligible to be IHSS providers only those individuals who have been convicted of, or incarcerated following a conviction for, those crimes specified in Welfare and Institutions Code (W&IC) section 12305.81:

- 1) Fraud against a government health care or supportive services program;
- 2) A violation of subdivision (a) of Penal Code (PC) section 273a (specified abuse of a child); or
- 3) A violation of PC section 368 (abuse of an elder or dependent adult).

Counties are further instructed to retain copies of all criminal offender record information (CORI) responses received from the California Department of Justice (DOJ) on IHSS provider applicants pending final resolution of this litigation. These records are required to be stored in a confidential manner with access only to authorized personnel.

## **BACKGROUND**

In October 2009, CDSS issued ACLs No. 09-52 and 09-70, which provided information and instructions to counties for implementing expanded provider enrollment requirements for the IHSS program, mandated by Assembly Bill, Fourth Extraordinary Legislative Session (ABX4) 19 (Chapter 17, Statutes of 2009).

In addition to general information about the expanded provider enrollment requirements, ACL No. 09-52 transmitted a revised Provider Enrollment Form (SOC 426) which included a statement that an individual seeking to become an IHSS provider was required to sign under penalty of perjury declaring that he/she had never been convicted of any disqualifying crimes, which included any felonies and certain serious misdemeanor crimes.

ACL No. 09-70 provided instructions on the criminal background check process and procedures indicating that an individual whose CORI showed that he/she had been convicted of a felony or certain serious misdemeanor crime should be deemed ineligible to be enrolled as an IHSS provider.

Subsequent to the release of those ACLs, a lawsuit, *Beckwith (Ellis) v. Wagner*, was filed in Alameda County Superior court to contest CDSS' interpretation of the crimes that would disqualify an individual from being an IHSS provider.

On November 24, 2009, the Alameda County Superior Court issued a Temporary Restraining Order (TRO) directing the CDSS to:

- Stop using IHSS provider enrollment forms or other documents requiring individuals to declare that they never have been convicted of a felony crime or serious misdemeanor and/or state that persons convicted of such crimes are not eligible to be IHSS providers; and
- Stop disqualifying or finding individuals ineligible to be IHSS providers on the basis that they have been convicted of a felony or a serious misdemeanor at some point in their life and who are otherwise not disqualified.

In order to comply with the TRO, CDSS issued ACL No. 09-78, dated November 25, 2009, which instructed counties to use the prior version of the SOC 426 which did not include the declaration or any reference to disqualifying crimes, and to limit the disqualification of individuals to those who, in the last 10 years, had been convicted of, or incarcerated following a conviction for only the crimes specified in W&IC section 12305.81.

On March 26, 2010, the Alameda County Superior Court issued its order in *Beckwith (Ellis) v. Wagner* (No. RG09-484051). The court limited the crimes that make an individual ineligible to be an IHSS provider to those crimes listed only in W&IC section 12305.81. On May 24, 2010, CDSS filed an appeal of the decision by the Alameda County Superior Court.

In early August of this year, CDSS circulated a draft ACL for stakeholder comments. The draft ACL informed counties that the previous policy which disqualified from being a provider any individual who had ever been convicted of a felony or serious misdemeanor crime would be reinstated. On August 23, 2010, the Alameda County Superior Court issued an Order Granting Petitioner's Application for Provisional Relief. The court order enjoins CDSS from issuing as final the ACL which had been circulated for stakeholder comments. As a result, counties are limited to the three crimes listed in W&IC section 12305.81 as a basis for excluding an individual from becoming a provider.

#### **CLARIFICATION ON EXPUNGEMENT OF A DISQUALIFYING CRIME**

While the court injunction was in place, CDSS issued ACL No. 10-05, dated February 17, 2010, which contained a question addressing expungement of a conviction pursuant to PC section 1203.4, and what effect it would have on an individual's eligibility to be enrolled as an IHSS provider. The response provided to that question indicated that a conviction that is expunged pursuant to PC section 1203.4, releases a person from all "penalties and disabilities" resulting from the offense, and that as a result, an expunged conviction for a disqualifying crime would not make an individual ineligible to be enrolled as a provider in the IHSS program.

However, at this time, CDSS is reinstating the policy established before the court order in *Beckwith (Ellis) v. Wagner*. Consistent with existing Medi-Cal rules for provider enrollment, a conviction means that the judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether there is a post-trial motion, an appeal pending, or the judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed. In short, an expunged conviction for a disqualifying crime would not make an individual eligible to be enrolled as a provider in the IHSS program. This policy- is consistent with case law interpreting PC section 1203.4 and language in W&IC section 12305.81. -This policy will be applied to any appeals pending before CDSS. -Upon receipt of this letter, counties shall exclude individuals who have been convicted of a disqualifying crime regardless of any expungement that may have occurred.

CDSS' appeal of the March 26, 2010 court ruling is still pending. In addition, CDSS is pursuing legislative changes which would expand the criminal convictions which would disqualify an individual from being enrolled as an IHSS provider. CDSS will keep counties apprised of developments in this litigation and its legislative efforts.

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Should you have questions regarding information in this ACL, please contact the Adult Programs Policy Bureau at (916) 229-4000.

Sincerely,

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Adult Programs Division

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