



Disability
Rights
California

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California's protection and advocacy system

November 4, 2011

Sent via US Mail, email and fax

Will Lightbourne, Director
California Department of Social Services
744 P Street
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Toby Douglas, Director
California Department of Health Care Services
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PO Box 997413
Sacramento CA 95899-7413

Re: Implementation of SB 73 and 20% Reductions in IHSS
service hours

Dear Directors Lightbourne and Douglas,

We are writing to communicate our grave concerns regarding the State's potential implementation of 20% cuts in In-Home Supportive Services (IHSS) authorized hours. We have reviewed the draft All-County Letter (ACL) released by CDSS on November 1, 2011, which states that if the budget trigger is pulled, CDSS will issue notices of action on December 15, 2011 and the reductions will go into effect on January 1, 2012.

We urgently request that you delay implementation of these reductions in light of the apparent conflicts between the requirements of federal law and SB 73, and the proposed implementation procedures and notices. We request that CDSS agree not to issue notices of action and agree to make no changes to CMIPS until we are able to meet and resolve these legal and procedural problems, which are discussed at greater length below.

In addition, we note that CDSS' plan to implement the reductions on January 1, 2012 by reprogramming of CMIPS as early as December 1, 2011 is unworkable. CDSS will not know whether the budget trigger will actually be pulled until December 15, 2011. If revenues increase and the budget trigger is not pulled after all, CDSS will have wasted public funds in making needless changes, which will then be very difficult and costly to undo. Even worse, the timing is so tight that an attempt to manually reverse the programmed reductions is likely to result in many errors, so that recipients could receive erroneous reduction notices and a loss of benefits.

It is also unreasonable to expect IHSS recipients to respond in a timely manner to complex notices and application deadlines over the Christmas and New Year time period, which includes two national holidays when post offices are closed. In addition, given the heavy volume of holiday mail, it is likely that mailed notices of action will be lost, mis-delivered or delayed.

1. CDSS Must Delay Implementation Until It Can Ensure That Children And Youth Under Age 21 Are Exempt From The 20% Reduction In IHSS Hours.

SB 73 does not exempt children under age 21 from the 20% across-the-board cuts in personal care service hours. SB 73, adding Cal. W&IC 12301.07(a) (1). However, these children and youth are protected by the EPSDT mandate in Medicaid law. Across-the-board reductions in Medicaid personal care services (such as IHSS) provided to a child regardless of medical necessity will violate the EPSDT standard.

The new supplemental care program outlined in the draft ACL and in SB 73 will permit restoration of some or all of recipients' personal care hours if they can demonstrate that they are at risk of out-of-home placement. Cal. W&IC 12301.07(f). This program appears to be an attempt to address California's "*Olmstead*" obligation under the Americans with Disabilities Act (ADA). However, it does not satisfy EPSDT's "correct or ameliorate" standard, since it is not tied to medical necessity. Children who will not qualify for the Care Supplement because they are not at imminent risk of

out-of-home placement may still require IHSS services in order to maximize their rehabilitative potential.¹

The draft ACL does not discuss this issue or explain how CDSS intends to ensure that all children under age 21 are exempted from the 20% reductions. The State must delay implementation of the reductions until it can confirm that CMIPS has the capacity to consistently and reliably identify these children and exempt them from the reductions.

2. CDSS Must Delay Implementation Until It Revises the Draft Supplemental Care Worksheet, Which Improperly Excludes Many IHSS Recipients Who Will Be At Serious Risk Of Out-Of-Home Placement.

The draft Supplemental Care Worksheet released on November 1, 2011 has three parts. Parts A and B set the outside parameters for eligibility for the Care Supplement, which are based entirely on functional ranks for personal care services. This approach is not consistent with the requirements for the assessment tool in SB 73 itself. The statute requires the Department to “utiliz[e] standard of care criteria for relevant out-of-home placements, ... including, **but not limited**, criteria set forth in [the Medi-cal Manual of Criteria for SNFs and ICFs].” WIC § 12301.07(f)(1) (emphasis added). Relying on the functional ranks alone will miss many individuals who are at serious risk of out of home placement. CDSS must adopt a more individualized and inclusive approach to assessing risk and to the “relevant placements” in which people may end up. In addition to violating SB 73, CDSS’ proposed implementation of the Care Supplement will also run afoul of the ADA by resulting in needless institutionalization.

3. CDSS Must Delay Implementation Of The 20% Reductions Until IHSS Recipients Have Advance Notice Of Their Functional Ranks And An Opportunity To Contest These.

¹ We also note that recipients must make a separate application for the new “Care Supplement” program, and that the counties are likely to conclude that many children are not at serious risk of out-of-home placement, no matter how great their need. In our experience, many parents will insist on keeping their children at home, even if deep cuts in personal care services will place the child at risk of injury or deterioration in functioning. Consequently, many children will not qualify for the Care Supplement.

In 2009, DSS attempted to implement reductions in IHSS services based upon recipients' functional ranks and functional index score. Among the many problems with this approach was the fact that, prior to the proposed reductions, the great majority of IHSS recipients did not know their ranks and had no opportunity to discuss these with their workers, or to otherwise contest their rankings. In 2009, the fact that IHSS recipients were unfamiliar with their rankings also made the notices of action virtually incomprehensible, since they had to both explain the rankings for the first time and inform recipients of what their rankings were.

CDSS is no better position to rely on functional rankings now than it was in 2009. Recipients still are not provided with notice of their functional rankings. Their eligibility for restoration of their hours through the supplemental care program will depend on rankings that they have never even seen. CDSS must delay implementation of the 20% reductions until it has first provided IHSS recipients with advance notice of their rankings and an opportunity to appeal these.

4. CDSS Must Delay Implementation Of The 20% Reductions Until IHSS Recipients Have Advance Notice And An Opportunity To Appeal A Determination That They Have Zero Unmet Need.

SB 73 provides that the 20% reduction will be applied first from any unmet need. A similar procedure was used with the 3.6% reductions implemented earlier this year. Prior to these cuts, the unmet need determination was a minor part of the IHSS eligibility process. Recipients seldom challenged this determination because the notices of action fail to disclose a county's finding that the recipient has no unmet need, or how to appeal this determination. We wrote to DSS following the 3.6% cuts regarding multiple problems regarding the determination of unmet need. The Department's letter in response explicitly conceded that recipients receive no notice that they have been found to have zero unmet need, which is the decision that they would have the most interest in appealing.² As with the functional

² Specifically, the letter from DSS Deputy Director Eileen Carroll dated June 6, 2011 stated: "If a recipient has a documented unmet need the NOA will have a system generated NOA message at the bottom indicating the recipient's documented unmet need. There is no requirement to mention unmet need on the NOA if the recipient has

ranks, CDSS must first inform IHSS recipients of their unmet need determination, including a determination that their unmet need is zero, and allow them an opportunity to appeal this decision. CDSS must delay implementation of the 20% reductions until this process is completed.

5. CDSS Must Delay Implementation of the 20% Reductions Until It Resolves Multiple Problems In The Draft ACL Regarding Appeals And Due Process Protections.

Regarding due process and IHSS recipients' opportunity to appeal the 20% reduction or denial of the care supplement, the draft ACL raises far more questions than it answers. For example, if a member of an exempt category (such as someone on a home and community based waiver) is erroneously sent a notice of reduction, how will he or she know that he or she is exempt and appeal the reduction? Will recipients be able to both appeal the reduction and apply for the care supplement? If they are denied the care supplement, how will they make a timely appeal and will they continue to receive aid paid pending? Will people who apply for IHSS after January 2012 be considered for the care supplement, given that the draft notice of action has a final application deadline of February 1, 2012? What about current recipients who were denied a care supplement because they believed they had alternate resources or could rearrange hours, but later find that this is impossible and so are at serious risk of out of home placement? These are only a few of the many unresolved due process questions posed by CDSS' implementation plan, questions that cannot be resolved simply by submitting comments on the draft ACL next week, as CDSS has requested. CDSS must delay implementation until it has a

none." In essence, this letter confirms that recipients get a notice of action only when they get a positive or favorable decision regarding unmet need; they got NO notice of action when the county has made a negative decision and assigned them zero unmet need. This is nonsensical, as well as being contrary to fundamental due process.

In addition to the absence of any due process notice when recipients are denied unmet need hours, the Department's new policies regarding reassessment are problematic. Counties now rely on ACL 10-61 to require a letter from a doctor before permitting reassessment to determine a change in hours or unmet need. Deputy Director Carroll's letter fails to address the fact that there are many non-medical reasons for seeking a reassessment that do not require a doctor's note.

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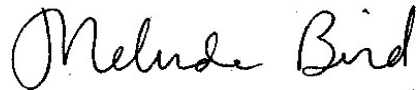
comprehensive, step-by-step plan that advocates, stakeholders, IHSS recipients and IHSS providers all understand.

6. It Is Imperative That DSS Not Re-Program The CMIPS System Until These Concerns are Resolved.

In 2009, when California began implementing an earlier round of IHSS budget cuts, DSS re-programmed its computers many weeks in advance of the issuance of notices of action and the effective date of the cuts. When a federal court enjoined the cutbacks, DSS was unable to undo the programming, so that cuts were imposed on thousands of recipients despite a court order to the contrary. We understand that re-programming will be implemented prior to December 1, 2011 in order to send out notices of action by December 15, 2011. We strongly urge the Department to delay these plans in light of the concerns raised in this letter.

Thank you for your consideration of this request. Please feel free to contact us at 213-355-3605, or Melinda.bird@disabilityrightsca.org.

Sincerely,



/s/

Melinda Bird
Senior Counsel

Debra Marley
Senior Attorney

CC: Diana Dooley, Secretary
California Health and Welfare Agency