



CDSS

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November 12, 2010

ALL-COUNTY LETTER (ACL) NO.: 10-51

TO: ALL COUNTY WELFARE DIRECTORS
ALL IHSS PROGRAM MANAGERS

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 All-County Letter (ACL) provides counties with the latest information and instructions regarding the *Beckwith (Ellis), et al. v. Wagner* lawsuit (Case No. RG 09484051). In early August 2010, the California Department of Social Services (CDSS) circulated for stakeholder comments, a draft ACL informing counties of the reinstatement of the previous policy which would disqualify any individual who had ever been convicted of a felony or serious misdemeanor crime from being an IHSS provider. On August 23, 2010, the Alameda County Superior Court issued an order prohibiting CDSS from reinstating this policy. Thus, CDSS will not be issuing as final the draft ACL which had been circulated for stakeholder comments.

As a result of the recent court ruling, counties are instructed to continue to deem ineligible to be IHSS providers only those individuals who, within the last 10 years, have been convicted of, or incarcerated following a conviction for, those crimes specified in Welfare and Institutions Code (W&I) 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).

REASON FOR THIS TRANSMITTAL

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

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.

Upon final resolution of this litigation, counties can return to the usual practice of destroying the CORI responses once the county's business need, as stated below, is fulfilled. The county/Public Authority (PA)/Non-Profit Consortium (NPC) business need for the CORI is to complete the hiring or enrollment process. For provider applicants who are disqualified based on the criminal record, CDSS advises all counties/PAs/NPC to retain the criminal history record information for a period of one year following the determination for purposes of any legal appeal the provider may file. The process for subsequent arrest information would be the same. If the subsequent arrest information could result in provider termination if disposition of the arrest is conviction, the subsequent arrest document should be retained until disposition. If the provider is terminated based on the disposition of the subsequent conviction, documents used as evidence of the conviction should be retained for a period of one year following the termination for purposes of any legal appeal the provider may file.

BACKGROUND

CDSS issued the above-referenced ACLs which conveyed a policy under which individuals with convictions for any felony or serious misdemeanor crime were precluded from being enrolled as IHSS providers. The *Beckwith (Ellis) v. Wagner* lawsuit was filed in Alameda County Superior court to contest CDSS' interpretation of the disqualifying crimes. Plaintiffs in the case filed for a temporary restraining order (TRO) which was granted by the judge. The judge eventually agreed with his decision in the TRO, and on March 26, 2010, ordered CDSS to discontinue its prior policy, and to limit disqualifying crimes to those specified in W&IC section 12305.81. The state filed a notice of appeal of this decision on May 24, 2010.

CLARIFICATION ON EXPUNGEMENT OF A DISQUALIFYING CRIME

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.

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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. Effective upon receipt of this letter, counties shall exclude individuals who have been convicted of a disqualifying crime pursuant to W&IC Section 12305.81, regardless of any expungement that may have occurred. This policy will also be applied to any applicant providers for whom an appeal of that denial is pending before CDSS.

The CDSS' appeal of the March 26, 2010 court ruling in *Beckwith (Ellis) v. Wagner* is still pending. The CDSS will keep counties apprised of developments in this litigation and any legislative efforts relating to the provider enrollment exclusionary crimes.

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

Sincerely,

Original Document Signed By:

EILEEN CARROLL
Deputy Director
Adult Programs Division