ITEM 9

REQUEST FOR RECONSIDERATION
STAFF ANALYSIS

Government Code Section 16262.5
Welfare and Institutions Code Sections 12301.3, 12301.4, 12301.6, 12301.8, 12302.25, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110

Statutes 1999, Chapters 90 and 91
Statutes 2000, Chapter 445

In-Home Supportive Services II
07-R-01 (00-TC-23)

County of San Bernardino, Claimant

Department of Social Services, Requestor

EXECUTIVE SUMMARY

Background

The Statement of Decision at issue is for the test claim *In-Home Supportive Services II* (IHSS). IHSS is a social services program developed to provide necessary care, such as housekeeping, grooming and medical transportation, to aged, blind or permanently disabled, low-income persons, with the goal of allowing the individual to remain in their home and out of nursing home care. Since its inception in 1973, IHSS has been jointly funded by federal, state, and county government.

The test claim statutes, in part, address the form in which the IHSS care providers are employed, referred to as the "mode of service." Prior law did not require the designation of an employer of record for individual providers. The Commission heard this test claim on April 16, 2007, during a regularly scheduled hearing. The Commission, by a vote of 4-3, partially approved the test claim. The adopted Statement of Decision was mailed on June 6, 2007.[1] On July 5, 2007, the Department of Social Services (DSS) timely filed a request for reconsideration.

Staff Analysis

Government Code section 17559, subdivision (a), and section 1188.4 of the Commission's regulations, grant the Commission, within statutory timeframes, discretion to reconsider a prior final decision. Any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.

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[1] The issuance of the Statement of Decision was held until after the receipt of the transcript of the April 16, 2007 Commission hearing, in order to incorporate witness testimony.

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted. A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.

If the Commission grants the request for reconsideration, a subsequent hearing is conducted to determine if the prior final decision is contrary to law and to correct an error of law. A supermajority of five affirmative votes is required to change a prior final decision.

Thus, at this stage, the sole issue before the Commission is whether it should exercise its discretion to grant the request for reconsideration.

DSS requests that the Commission reconsider and amend a portion of its decision to "1) clarify what costs are reimbursable and 2) establish an equitable level of reimbursement." DSS proposes that two of the approved activities be amended, as indicated by underline, as follows:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service <u>using whichever mode is the least costly for the county.</u> It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request <u>from July 12, 1999 until December 31, 2002</u>. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)

Regarding the request that the Commission amend its decision to add cost-limiting language to one approved activity, as the courts have made clear, the Commission is required to construe article XIII B, section 6 strictly and not extend its provisions to include matters not covered by the language used or "as an equitable remedy to cure the perceived unfairness resulting from political decision on funding priorities."[2] The legislation that required the counties to establish an employer of record did not require that the counties make their choice based on the least-costly method, nor does any other statute require that the choice be made on the basis of cost alone. Therefore the request does not address an error of law subject to reconsideration.

Regarding the request to add time-limiting language to another activity, staff finds that the law requiring the activity has no statutory end date and remains valid law, and thus the lack of time limitation in the Statement of Decision was not an error of law subject to reconsideration.

[2] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

The Commission has the following options:

- the Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present; or
- the Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration; or
- the Commission can take no action, which has the legal effect of denying the request.

Conclusion and Recommendation

Staff recommends that the Commission deny the request for reconsideration, finding that the requestor has raised no issues that merit reconsideration.

STAFF ANALYSIS

Requestor

Department of Social Services

Chronology

04/16/07	Commission hearing on the test claim
04/16/07	Commission adopts the Statement of Decision
06/06/07	Statement of Decision is mailed to the claimant and mailing list
07/05/07	Department of Social Services files a request for reconsideration

Legal Process for Reconsideration

Government Code section 17559, subdivision (a), grants the Commission, within statutory timeframes, discretion to reconsider a prior final decision. That section states the following:

> The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.[3]

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted.[4] A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.[5]

If the Commission grants the request for reconsideration, a subsequent hearing is conducted to determine if the prior final decision is contrary to law and to correct an error of law.[6] A supermajority of five affirmative votes is required to change a prior final decision.[7]

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[3] California Code of Regulations, title 2, section 1188.4, subdivision (b).

[4] California Code of Regulations, title 2, section 1188.4, subdivision (f).

[5] *Ibid*.

[6] California Code of Regulations, title 2, section 1188.4, subdivision (g).

[7] California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

Thus, at this stage, the sole issue before the Commission is whether it should exercise its discretion to grant the request for reconsideration. In this regard, the Commission has the following options:

- The Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present; or
- the Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration; or
- the Commission can take no action, which has the legal effect of denying the request.

The Commission's Decision

The Statement of Decision at issue is for the test claim *In-Home Supportive Services II* (IHSS). IHSS is a social services program developed to provide necessary care, such as housekeeping, grooming and medical transportation, to aged, blind or permanently disabled, low-income persons, with the goal of allowing the individual to remain in their home and out of nursing home care. Since its inception in 1973, IHSS has been jointly funded by federal, state, and county government.

The test claim statutes, in part, address the form in which the IHSS care providers are employed, referred to as the "mode of service." Prior law did not require the designation of an employer of record for individual providers. The Commission heard this test claim on April 16, 2007, during a regularly scheduled hearing. The Commission, by a vote of 4-3, partially approved the test claim. The request for reconsideration is limited to the following approved activities:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [8]
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [9]

[8] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[9] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

Request for Reconsideration

On July 5, 2007, the Department of Social Services (DSS) timely filed this request for reconsideration. DSS requests that the Commission reconsider and amend a portion of its decision to "1) clarify what costs are reimbursable and 2) establish an equitable level of reimbursement." DSS proposes to accomplish this with two amendments to the text of the approved activities, which will be discussed below.

Discussion

As indicated above, the Department of Social Services requests that the Commission reconsider and amend its decision on the *In-Home Supportive Services II* test claim to add language requiring that the counties' reimbursement by the state "be limited to the least expensive method of administering the program." The request for reconsideration includes a second issue: "[w]ith regard to Advisory Committee, CDSS' understanding of the ruling is that it is limited to the period from July 12, 1999 until December 31, 2002. However, the order did not clearly state this time limit and we are asking that the clarification be added."

For the reasons described below, staff recommends that the Commission deny DSS's request for reconsideration and find that the requestor has not raised issues that merit reconsideration on either point.

The first issue raised by DSS requests that the Commission's Statement of Decision be amended to add cost-limiting language to the activity for establishing an employer of record, as indicated in underline below:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service <u>using whichever mode is the least costly for the county.</u> It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [10]

At the April 16, 2007 Commission hearing, DSS testified that, regarding the choice of employer-of-record, "[w]e think there is a least-cost method in terms of administrative costs that a county could use; and that it is only these costs that are arguably required by the test claim statutes. And, therefore only those costs should be reimbursable."[11] Thus, the same allegations were raised at the hearing on the test claim and, after full consideration, a motion was made to adopt the staff analysis, the motion was seconded, and the Commission voted to approve the staff recommendation without adopting the argument from DSS.

The Commission has the exclusive jurisdiction to determine whether there are reimbursable state-mandated costs. [12] Within the limited time period allowed by statute, the Commission

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[10] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[11] April 16, 2007 Transcript, page 24.

[12] Government Code sections 17500, 17551, 17552. See also *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.

retains jurisdiction after a final decision to reconsider that decision to ensure it has carried out its duty to correctly decide the mandate question.[13] However, finality of decisions is favored, and reconsideration should not be viewed as a means to decide again what has already been decided.[14] In this regard, the California Supreme Court has stated the following:

> [. . .] that the decisions of the various agencies of this state are reached, in the overwhelming majority of the proceedings undertaken, only after due consideration of the issues raised and the evidence presented. While occasional mistakes are an unfortunate by-product of all tribunals, judicial and administrative, the fact remains that a petition for reconsideration, raising the same arguments and evidence a second time, will not likely often sway an administrative body to abandon the conclusions it has reached after full prior consideration of those same points.[15]

Moreover, staff finds that the Commission's decision to approve the activity without such limiting language is correct under article XIII B, section 6, and is supported by case law; thus, there is no error of law. The test claim statute, Welfare and Institutions Code section 12302.25, subdivision (a), requires counties to establish "an employer for in-home supportive service providers," and each county "shall … solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services."[16] At no point does the Legislature require that the counties select the mode of service that imposes the least-cost option, as proposed by DSS.

Article XI, section 7 of the California Constitution authorizes counties to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." This constitutional grant of power allows counties a certain amount of independence and discretion in matters of local concern. The Legislature required that counties choose an in-home supportive services provider option by taking the advice and recommendation of a committee made up of "no less than 50 percent" of persons who have used public or private in-home supportive services. The committee must also have a minimum of one to two providers of in-home supportive services, and no more than one county employee may serve. The Legislature was clearly requiring an advisory committee designed to provide informed public views to the counties to utilize when making this choice; but left the ultimate decisionmaking to the counties, without a mandate that the least-costly method be the final choice.

As the courts have made clear, the Commission is required to construe article XIII B, section 6 strictly and not extend its provisions to include matters not covered by the language used or "as an equitable remedy to cure the perceived unfairness resulting from political decision on funding

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[13] Government Code section 17559.

[14] "The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive arguments is small. Indeed no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute. (Code Civ. Proc., § 1008.)" *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501.

[15] *Id.* at page 502.

[16] Welfare and Institutions Code section 12302.25, subdivision (d).

priorities."[17] Therefore, staff finds that there is no error of law that can be addressed by approving this portion of the reconsideration request.

Finally, addressing the DSS request to amend the Statement of Decision to establish a time limitation for an additional activity, staff finds there is no error in the Statement of Decision. DSS proposes that one of the approved activities be amended, as indicated by underline, as follows:

- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request <u>from July 12, 1999 until December 31, 2002</u>. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [18]

A different approved activity, for establishing an employer of record for IHSS providers, does include such language, but the same cannot be applied to the activity as requested by DSS. Welfare and Institutions Code section 12302.25, subdivision (j), as amended by Statutes 2002, chapter 1135, operative January 1, 2003 created a "default" employer of record if a county had not completed the process of *establishing an employer of record* as set out in earlier statutes. The Commission found that only on or after January 1, 2003, was the "default" employer of record provision applicable, and any requirement to *establish* an employer of record was no longer mandatory. Therefore, the Commission correctly found that the administrative activity to establish an employer of record was limited from July 12, 1999, the operative date of Statutes 1999, chapter 90, until December 31, 2002. The same is not true for the activity DSS identified in its request for reconsideration.

The activity identified by DSS is to offer an employer of record in the individual provider mode, "*in addition to* a county's selected method of establishing an employer for in-home supportive service providers." The same January 1, 2003 date does not apply to the administrative activities of establishing an additional "individual provider employer option." Because this activity is required to be performed "[u]pon request of a recipient," and "in addition to a county's selected method of establishing an employer for in-home supportive service provided pursuant to this subdivision" staff finds that the required activity could occur at any time, before or after the date that counties are required to establish an employer of record for IHSS providers.[19]

Accordingly, staff recommends that the Commission deny the request for reconsideration and find that DSS has not raised issues that merit reconsideration.

Conclusion and Recommendation

Staff recommends that the Commission deny the request for reconsideration, finding that the requestor has raised no issues that merit reconsideration.

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[17] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[18] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[19] Welfare and Institutions Code section 12302.25, subdivision (a).