

WELCOME TO PHASE 4 OF THE IHSS TRAINING ACADEMY

The California Department of Social Services (CDSS) has partnered with California State University, Sacramento (CSUS) to develop and implement a statewide “In-Home Supportive Services (IHSS) Training Academy.” These trainings are designed to enhance the IHSS social workers’ skills in performing complex IHSS assessments. Participants will share best practices and take part in exercises designed to apply the principles covered and practiced during the training which will lead to greater consistency and uniformity in the assessment and authorization of IHSS services.

Phase 1

The first phase of the Training Academy was successfully implemented during July-December 2005, with a total of 98 two-day trainings held statewide for 2,151 participants. During May-July 2006, an additional nine trainings were offered across the state for 204 participants. The Phase 1 curriculum covered Assessing Needs Based on the Consumer’s Abilities and Functioning, Gathering Information from Consumers, Complex Assessment Situations, Authorizing Services, Authorization Trends, Documenting Exceptions, and Working with Consumers with Mental Illness. The training materials and answers to some of the Phase 1 “Parking Lot” questions can be viewed on the CDSS IHSS website at:

http://www.dss.cahwnet.gov/dapd/IHSSSOCIAL_2262.htm
Primary DSS Website: <http://www.dss.cahwnet.gov>

Phase 2

During January-June 2006, 2,298 participants attended the 98 two-day trainings held statewide for the second phase of the Training Academy. The curriculum for this phase included Hourly Task Guidelines, Determining and Documenting Appropriate Exceptions, Working with Consumers with Mental Illness, Assessing the Needs of Consumers with Severe Disabilities, Assessing Children, and Protective Supervision.

Phase 3

The Phase 3 training curriculum covered the new Hourly Task Guidelines (i.e., Regulation Changes, Process of Utilization, Exceptions, and Documentation) and Dealing with Challenging Case Situations. In addition, reference materials were provided on IHSS Plus Waiver, Share of Cost, Point of Service, and Implications of Aging. Nearly 2,400 participants took part in the 100 one-day trainings offered statewide.

Overview of Phase 4

Phase 4 of the Training Academy will provide participants with valuable information on:

- Fair Hearings
- Variable Assessment Intervals
- Program Integrity
- Paramedical Services
- Quality Assurance Activities

EVIDENTIARY PRINCIPLES

Direct evidence is evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. (Evidence Code (Ev. C.) §410) Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. (Ev. C. §411)

The Evidence Code (Evid. Code) deals with general rules as to the determination of credibility of witnesses. The rule provides as follows: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- "(a) His demeanor while testifying and the manner in which he testifies.
- "(b) The character of his testimony.
- "(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- "(d) The extent of his opportunity to perceive any matter about which he testifies.
- "(e) His character for honesty or veracity or their opposites.
- "(f) The existence or nonexistence of a bias, interest, or other motive.
- "(g) A statement previously made by him that is consistent with his testimony at the hearing.
- "(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- "(i) The existence or nonexistence of any fact testified to by him.
- "(j) His attitude toward the action in which he testifies or toward the giving of testimony.
- "(k) His admission of untruthfulness."

(Evid. Code §780)

"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evidence Code §1200(a))

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of a business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation;
and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Evidence Code §1271)

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code §412)

In administrative tribunals, the party asserting the affirmative of the issue generally has the burden of proof. (*Cornell v. Reilly* (1954) 127 Cal.App.2d 178, 273 P.2d 572; and California Administrative Agency Practice, California Continuing Education of the Bar (1970) p.183)

The burden of producing evidence is the obligation of a party to produce evidence sufficient to avoid a ruling against him on the issue. (Evidence Code (Evid. Code) §110) The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact. (Evid. Code §550)

The burden of proof is the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evidence Code §115)

The county has the burden of going forward in the state hearing to support its determination. (§22-073.36)

In the June 1995 UCLA Law Review, Professor Michael Asimow discusses review of California administrative agency actions which allow discretion to the agency.

“In exercising discretion, an agency generally must consider and balance various factors established by statute, constitution or common law. A reviewing court decides independently whether the agency considered all of the legally relevant factors and whether it considered factors that it should not have considered.” [Footnotes omitted] “Within the legal limits constraining an agency's discretion, the agency has power to choose between alternatives. A court must not substitute its judgment for the agency's, since the legislature delegated discretionary power to the agency, not to the court. Nevertheless, a court should reverse if an agency's choice was an abuse of discretion. [Footnotes omitted] Review for abuse of discretion consists of two distinct inquiries: the adequacy of the factual underpinning of the discretionary decision and the rationality of the choice.” [Footnotes omitted] (Asimow, Michael, 42 UCLA Law Review 1157, 1228, 1229, June 1995)

The 9th Circuit Court of Appeals has required that the ALJ in a social security case develop the record, even when the claimant is represented. There is a heightened duty when the claimant is mentally ill. As the Court said:

“The ALJ in a social security case has an independent 'duty to fully and fairly develop the record and to assure that the claimant's interests are considered.’ *Smolen*, 80 F.3d at 1288 (quoting *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)). This duty extends to the represented as well as to the unrepresented claimant. *Id.* When the claimant is unrepresented, however, the AU must be especially diligent in exploring for all the relevant facts. *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978). In this case, Tonapetyan was represented, but by a lay person rather than an attorney. The ALJ's duty to develop the record fully is also heightened where the claimant may be mentally ill and thus unable to protect her own interests. *Higbee v. Sullivan*, 975 F.2d 558, 562 (9th Cir.1992). Ambiguous evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to ‘conduct an appropriate inquiry.’ *Smolen*, 80 F.3d at 1288; *Armstrong v. Commissioner of Soc. Sec. Admin.*, 160 F.3d 587, 590 (9th Cir.1998). The ALJ may discharge this duty in several ways, including: subpoenaing the claimants physicians, submitting questions to the claimants physicians,

continuing the hearing, or keeping the record open after the hearing to allow supplementation of the record. *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998); *Smolen*, 80 F.3d at 1288.” (*Tonapetyan v. Halter* (2001) 242 F. 3d 1144, 1150)

Although a treating physician's opinion is generally afforded the greatest weight in disability cases, it is not binding on an ALJ with respect to the existence of an impairment or the ultimate determination of disability. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). When there is a conflict between the opinions of a treating physician and an examining physician, as here, the ALJ may disregard the opinion of the treating physician only if he sets forth "specific and legitimate reasons supported by substantial evidence in the record for doing so." *Lester v. Chater*, 81 F. 3d 821, 830 (9th Cir. 1996); see also *Cotton v. Bowen*, 799 F. 2d 1403, 1408 (9th Cir. 1986). Although the contrary opinion of a non-examining medical expert does not alone constitute a specific, legitimate reason for rejecting a treating or examining physician's opinion, it may constitute substantial evidence when it is consistent with other independent evidence in the record. *Magallanes*, 881 F.2d at 752. (*Tonapetyan v. Halter* (2001) 242 F. 3d 1144, 1148,49)

A witness does not have to be a doctor to give expert testimony on certain medical issues. (See, e.g., *Longuy v. La Cociete Francaise de Bienfaisance Mutelle* (1921) 52 CA 370 [dealing with nurses]; *Delia S. v. Torres* (1982) 134 CA 3d 471 [dealing with licensed clinical social workers])

Medical opinions are statements from acceptable medical sources that reflect judgments about the nature and severity of a claimant's impairment(s), including symptoms, diagnosis and prognosis, what the claimant can still do despite impairment(s), and physical or mental restrictions. Medical opinions may be received from treating sources, nontreating sources who have examined the claimant (e.g., consulting physicians or psychologists), and nonexamining sources (e.g., physicians and psychologists who work for insurance companies, disability determination services) other than those who work for the disability determination services (DDS) or SSA. (For treatment of DDS or SSA physicians, consult POMS DI 24515.007.) In addition to considering medical opinions, evidence from other sources (e.g., chiropractors) may be used to help understand how the claimant's impairment affects his or her ability to work. (Program Operations Manual System (POMS) DI 24515.002A.)

When the case record contains an opinion from a claimant's treating source, it may be given controlling weight or more weight than an opinion from a nontreating source. Give controlling weight to a treating source's medical opinion regarding the nature and severity of the claimant's impairment(s) if the opinion is well supported by medically acceptable clinical and laboratory diagnostic techniques and it is not inconsistent with the other substantial medical or nonmedical evidence in the case record. (POMS DI 24515.003A.2.) Generally, give more weight to:

- (1) Medical opinions from sources who have examined the claimant than from sources which have not examined the claimant.
- (2) Treating source opinions than nontreating source opinions. (POMS DI 24515.005)
- (3) An opinion from a medical source who provides relevant supporting evidence (e.g., medical signs, laboratory findings) and a better explanation for the opinion.
- (4) An opinion consistent with other evidence of record.
- (5) The opinion of a specialist about medical issues related to the source's specialty.

(Program Operations Manual System (POMS) DI 24515.003A.4.)