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August 27, 2010

State of California -
Emergency Medical Services Authority
1930 9th Street
Sacramento, CA 95811-7043

Re: Comments Regarding Revisions to EMSA Policy #141

To Whom it May Concern:

This letter is for the purpose of providing comments on the State Emergency Medical Services Authority (EMSA) draft policy #141 entitled "Review Criteria and Policy for Transportation and Exclusive Operating Area Components of the EMS Plan". At the same time, we also want to discuss the relationship between Sections 224 and 201 of the California Health and Safety Code pertaining to Emergency Medical Services (EMS).

Summary

We feel the EMSA Draft Policy #141 fails to recognize the relationship between Health and Safety Code section 1797.201 ("Section 201") which protects the rights of cities and fire districts to administer their prehospital EMS operations, and Health and Safety Code section 1797.224 ("Section 224"), which authorizes the County local EMS Agency ("LEMSA") to create exclusive operating areas ("EOA"). In the body of Section 224, it is expressly made subject to Section 201, meaning a county or EMS agency may not unilaterally displace a Section 201 city or fire district that has continued to operate its emergency medical services.

Draft EMSA Policy #141

State EMSA policy #141, adopted in February 1997, addressed the competitive process that the LEMSA (the county) must use to create exclusive operating areas, and acknowledged the exception for existing providers. The new EMSA draft policy #141 (Draft Policy #141), expands into much more detail regarding the requirements of the competitive process and the criteria to be considered if the LEMSA chooses to continue the use of existing providers.

Draft Policy #141 includes a brief reference to Section 201 (the 1997 Policy #141 did not), in the portion of the document entitled "Exclusivity without a Competitive Process." (This section begins on the top of page 13 as Section C). The Section 201 reference is at the top of page 15, as follows:

"Section 1797.201 allows existing cities and fire districts that provided care (transporting and non-transporting) prior to June 1, 1980, to continue services at the same type, and can

retain administration of care, as long as a LEMSA maintains medical control of care. See, County of San Bernardino v. City of San Bernardino, 15 Cal. 4th 909; 64 Cal. Rptr.2d 814 [1997].

While Section 1797.201 of the code allows cities and fire districts to continue services provided prior to June 1, 1980 until such time as a written agreement for provision of EMS is reached, it does not address the issue of exclusivity. Exclusivity cannot be granted to any provider unless the requirements established in Section 1797.224 are met.” (Draft policy #141, page 15, lines 3-14).

Comments to Draft Policy #141

1. The wording of the first paragraph is not concise and does not use the correct statutory terminology:

(a) “...*that provided care (transporting and non-transporting)*...” (p. 15, line 3-4). Section 201 applies to cities and fire districts that provided “prehospital emergency medical services.” The term “care” is not defined in the policy, the EMS Act or case law.” The correct statutory terminology should be used.

(b) “...*to continue services at the same type...*” (p. 15, line 5). Again, incorrect terminology. Section 201 states that cities and fire districts shall continue services of prehospital emergency medical services “at not less than the existing level” than what was provided on June 1, 1980.

(c) “...*and can retain administration of care...*” (p.15, line 5). Incorrect terminology. Section 201 states that cities and fire districts shall retain “administration of prehospital EMS.”

2. The second paragraph (p. 15, lines 10-14) is misleading as written. Draft Policy #141 does not address the final sentence of Section 224, where it is expressly made subject to Section 201. In the seminal case County of San Bernardino v. City of San Bernardino (1997) 15 Cal.4th 909, the California Supreme Court addressed the Section 201 reference in Section 224, stating:

“...the reference to Section 1797.201 is most reasonably understood as providing that a local EMS agency’s ability to create EOAs may not supplant the cities’ or the fire districts’ ability to continue to control EMS operations over which they have historically exercised control.” (15 Cal.4th at 932)

Therefore, Draft Policy #141 should expressly state that the LEMSA cannot unilaterally create an EOA for a type of service within a city or fire district’s jurisdiction if that city or fire district has 201 rights to that particular service. If a city or fire district has 201 rights to all types of emergency ambulance service, the county cannot award an EOA within that jurisdiction to another provider.

Background

In 1980 the state legislature passed the comprehensive "Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act" ("EMS Act"), codified into the Health and Safety Code, to govern nearly every aspect of the statewide EMS system, at the state, county and local levels. Health and Safety Code section 1797.201 ("Section 201") was enacted as part of the EMS Act, to protect the right of cities and fire districts to continue the administration of their prehospital EMS.

Section 201 provides as follows:

"Upon the request of a city or fire district that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into an agreement with the city or fire district regarding the provision of prehospital emergency medical services for that city or fire district. Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and **the administration of prehospital EMS by cities and fire districts presently providing such services shall be retained by those cities and fire districts**, except the level of prehospital EMS may be reduced where the city council, or the governing body of a fire district, pursuant to a public hearing, determines that the reduction is necessary. Notwithstanding any provision of this section; the provisions of Chapter 5 (commencing with Section 1798) shall apply."
[emphasis added] (Health and Safety Code §1797.201)

In 1984, the California legislature amended the EMS Act in response to a 1982 US Supreme Court decision which held that local governments granting monopolies were not exempt from federal anti-trust laws unless they acted pursuant to a clearly articulated and affirmatively stated state policy.

Three sections were added to the Health and Safety Code at that time:

- (a) Section 1797.6, which articulates the public policy of the state in enacting the three new sections to provide immunity from federal anti-trust laws;
- (b) Section 1797.85, which defines exclusive operating areas as an area or subarea defined by the EMS plan for which a local EMS agency "restricts operations to one or more emergency ambulance services or providers of limited advanced life support or advanced life support"; and,
- (c) Section 1797.224, which authorizes the local Emergency Medical Services Agency (LEMSA), in this instance the County of Los Angeles, to grant exclusive operating areas (EOA) to EMS providers through a competitive process. An exception to the competitive process requirement provides that the LEMSA may choose to "continue the use of existing providers operating within the manner and scope in which service has been provided without interruption since January 1, 1981. Section 224 specifically states that "[n]othing in this section supersedes Section 1797.201."

The California Supreme Court, in County of San Bernardino v. City of San Bernardino (1997) 15 Cal.4th 909, acknowledged that Section 224 and its companion sections (1797.6 and 1797.85) were added to the EMS Act "for the purpose of authorizing local EMS agencies to grant exclusive

operating areas to private EMS providers such as ambulance companies.” (15 Cal.4th at 917) Just as the County may not supplant a city or fire district with 201 rights, the court also explained that if a city or fire district and concurrent jurisdiction with another county authorized provider as of June 1, 1980, the city or fire district would continue to administer its own EMS operations, and the other provider would continue to operate as well under the auspices of the County/LEMSA. (*Id.* at 933-934)

In Valley Medical Transport v. Apple Valley Fire Protection District et al. (1998) 17 Cal.4th 747, 759, the Court further addressed Sections 201 and 224, stating, “an EOA permits local EMS agencies to offer private emergency service providers protection from competition in profitable, populous areas in exchange for the obligation to serve unprofitable, more sparsely populated areas.”

The Valley Medical Court echoed what it stated in San Bernardino (and what is missing in Draft Policy #141):

“...the ability to create EOA’s in section 1797.224 is made expressly subject to 1797.201, and therefore would not permit a county or EMS agency to unilaterally displace a city or fire district continuing to operate emergency medical services.” (17 Cal.4th at 759)

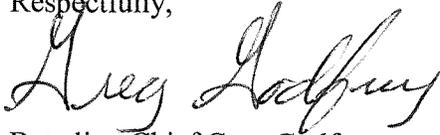
It is important to understand that if a City with 201 rights ceases to offer or abandons a certain type of emergency medical services, nothing prevents the County from assigning an EOA within the area of the city, for that type of service that was discontinued or abandoned. (Valley Medical, *supra*, 17 Cal.4th at 759)

At least one court prior to the San Bernardino case attempted to define the geographical area “grandfathered” in by Section 201, and found that Section 201 applied to provision of services “for that City or fire district” and not to unincorporated areas that the city or fire district may have historically serviced. (City of Petaluma v. County of Sonoma (1993) 12 Cal.App.4th 1239, 1244) In other words, any unincorporated County area that a City serviced outside of the City’s own boundaries may be turned into an EOA by the County, either through a competitive bidding process, or by the County awarding the unincorporated area to the City, or to a concurrent provider, if the City (or other concurrent provider) operated within the manner and scope in which service has been provided without interruption since January 1, 1981. Note that the statute uses “may”, not shall, therefore, creating an EOA is permissive, not mandatory.

One final note: Cities or fire districts do not have the power to create an EOA on their own (County of San Bernardino v. City of San Bernardino, *supra*, 15 Cal.4th at 931-932) EOAs are created by the LEMSA, approved by the state as part of the LEMSA’s overall EMS plan, and made immune to federal antitrust actions through the 1984 Health and Safety Code amendments. While a city with 201 rights can and may provide EMS services exclusively within its jurisdiction, that fact alone does not create a section 224 EOA. A city with 201 rights would want to carefully consider the implications before signing a county contract for an EOA within its jurisdiction. Upon expiration of the contract, the County may argue that it is going to open up the area to a competitive process; and a court may find that the City acquiesced to County control and that the City’s 201 rights have been forfeited by signing of a County contract.

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Respectfully,

A handwritten signature in cursive script that reads "Greg Godfrey". The signature is written in black ink and is positioned above the typed name.

Battalion Chief Greg Godfrey,
EMS Program Director

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