

FINDING OF EMERGENCY
Appeal Process for Disapproval of an Emergency Medical Services Plan by the EMS Authority

The Emergency Medical Services Authority (EMSA) finds that an emergency exists and that emergency regulations are necessary to avoid serious harm to the public peace, health, safety, or general welfare.

SPECIFIC FACTS DEMONSTRATING THE EXISTENCE OF AN EMERGENCY AND THE NEED FOR IMMEDIATE ACTION

Overview

The proposed regulations must be adopted on an emergency basis pursuant to the requirements set forth in Health and Safety Code (HSC) § 1797.105. This statute implements an appeal process for local emergency medical services agencies (LEMSAs) when their EMS plan has been denied by EMSA.

Specific Basis for the Finding of Emergency 1797.105

EMSA is presenting these regulations in order to comply with HSC § 105(c) which permits a LEMSA to appeal, to the EMS Commission, a determination made by EMSA on their EMS plan.

Although State statutes allow LEMSAs to appeal a determination by EMSA to disapprove an EMS plan, there are no existing regulations which provide for the specific appeal process. Regulations have not been adopted to address the appeal process because throughout its 34 years of existence, EMSA has not had a single appeal on an EMS plan determination. In the last year there have been 3 appeals, all of which are currently pending due to the lack of an appeal process.

The reason for the recent appeals stems from EMSA disapproving some of the EMS plans based on non-compliance with the statutes which govern exclusive operating areas (EOAs). HSC § 1797.224 allows LEMSAs to create EOAs in the development of its local EMS plan if a competitive process is used to select the provider(s), this is typically achieved through a request for proposal (RFP). However, providers who have performed services in the same manner and scope, without interruption, since January 1, 1981, are considered exempt from the RFP process and the LEMSA is not required to conduct a competitive process. This is considered "grandfathering".

Grandfathering is not allowed if a change in ownership has taken place with any of the providers within the area. An arms-length sale rather than a reorganization of the existing entity may be considered a change in the manner and scope and affect the grandfathering privileges of Section 1797.224. Any change in the manner and scope could negate the ability to grandfather a provider and require a competitive process to be conducted. There are disagreements between EMSA and some of the LEMSAs on

what constitutes a change in the manner and scope of the services and some LEMSAs have filed appeals due to the denial of their EMS plan.

Additionally, HSC § 1797.201 permits cities and fire districts to continue to maintain administration of prehospital services they were providing as of June 1, 1980. However, two court cases¹ have ruled that cities and fire districts may not change the “type” of services that have been provided since June 1, 1980 (e.g., changing from non-transport services to transport services). Any change in the type of service requires the LEMSA to conduct a competitive process through an RFP. Some LEMSAs EMS plans have been disapproved based on this requirement which has resulted in the LEMSA filing for an appeal.

In making its determination whether or not to approve an EMS plan, EMSA must ensure that the LEMSA has complied with the statutory requirements regarding the competitive process in creating EOAs. This prevents discrimination, promotes fairness and social equity, and increases transparency in local agencies.

EMSA is presenting these regulations in compliance with HSC § 1797.107 which states that, *“The authority shall adopt, amend, or repeal, after approval by the commission... such rules and regulations...as may be reasonable and proper to carry out the purposes and intent of this division and to enable the authority to exercise the powers and perform the duties conferred upon it by this division not inconsistent with any of the provisions of any statute of this state.”* EMSA is requesting to adopt initial regulations as emergency regulations to immediately implement an appeal process in order to preserve the public peace, health, safety, or general welfare within the meaning of Section 11346.1 of the Government Code. The emergency regulations will be followed by the adoption of permanent regulations, in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).”

These Issues Could Not Be Addressed Through Nonemergency Regulations

Emergency regulations are necessary to ensure compliance with current statute which allows LEMSAs to appeal a disapproval of their EMS plan. An EMS plan that is disapproved may not be implemented which could cause serious harm to the health, safety, or general welfare and affect the ability of EMS providers to provide optimal EMS patient care.

Failure to address the situation through the emergency rulemaking process will delay the decision process of the 3 pending EMS plans for more than 1 year and any subsequent appeals received. The lack of resolve of the EMS plans is detrimental to the health, safety and general welfare of the public because resolution of the ambulance services selection process will be delayed.

¹ County of San Bernardino v City of San Bernardino and Shaffer’s Ambulance v County of San Bernardino

In some cases, this may cause an increase in ambulance response times, or the inability to provide paramedic services in some communities. This would affect the ability of hospitals to provide patients with optimal care. In 2011, reported use of the emergency department was highest among children under age 6 years old (24%)². Emergency Department physicians and nurses would most likely have adverse reactions to decreased patient care standards. This could result in widespread instability, tension, and negative public perception of EMS systems.

In addition, emergency regulations to establish an appeal process is critical to the 3 pending appeals since there is currently no method of resolution and the LEMSAs are being denied due process under the law. Failure to adopt emergency regulations to allow due process could open the Department to litigation.

AUTHORITY AND REFERENCE

Authority: Health and Safety Code § 1797.107

Reference: Health and Safety Code §§ 1797.105 and 254

INFORMATIVE DIGEST

- Under existing law, LEMSAs are required to submit annual EMS plans to EMSA (*H&SC § 1797.254*).
- The LEMSA may implement the annual EMS plan unless EMSA determines that the plan: 1) does not effectively meet the needs of the persons served and is not consistent with coordinating activities in the geographical area served; or 2) the plan is not concordant and consistent with applicable guidelines and/or regulations established by EMSA (*HSC § 1797.105(b)*).
- A LEMSA may appeal a determination made by EMSA to the EMS Commission (*HSC §1797.105(c)*).
- The Commission may sustain EMSAs determination or overrule and permit local implementation of the EMS plan. The decision of the Commission is final (*HSC 1797.105(d)*).

Currently there are no existing regulations that implement the statute that provides LEMSAs with the ability to appeal a determination of their EMS plan by EMSA. The adoption of the emergency regulations will implement a clear process for the LEMSAs to appeal, to the Commission, a determination of their EMS plan and allow them due process under state law. Additionally, the appeal process will allow the 3 pending appeals to be heard and will ensure the health, safety and general welfare of the public. The regulation process requires the Commission to seek recommendation from the

² National Center for Health Statistics.
Health, United States, 2012: With Special Feature
on Emergency Care. Hyattsville, MD. 2013

Office of Administrative Hearings which will prevent any conflict of interest or discrimination.

EMSA has reviewed all state regulations relating to the LEMSAs ability to appeal an EMS plan determination and has determined that there are no other existing regulations that are inconsistent or incompatible with the proposed emergency regulations.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The proposed regulations do not impose a reimbursable mandate on the LEMSAs. Any mandate imposed on the LEMSAs is a result of the administrative hearing process which is pursuant to the Administrative Procedure Act, Government Code Section 11500 et seq, and its associated regulations as contained in Title 1 of the California Code of Regulations.

COST ESTIMATE

Costs to the LEMSAs, state agencies, or federal funding to the State includes any cost recovery allowed to the prevailing party pursuant to the administrative hearing process under Title 1, California Code of Regulation, § 1042, excluding attorneys costs. In addition, there are costs associated with salaries, travel to the hearings, and cost recovery to the prevailing party. Due to the number of variables, it is impossible to estimate these costs as it will depend on how many appeals are received, the salary of staff preparing the appeals, where the hearing will be held (travel) and who prevails in the appeal.

