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ALL-COUNTY LETTER NO.:

TO: ALL COUNTY WELFARE DIRECTORS
ALL IN-HOME SUPPORTIVE SERVICES (IHSS) PROGRAM MANAGERS

SUBJECT: PROTECTIVE SUPERVISION CLARIFICATIONS

REFERENCES: [ACL 98-87 \(October 30, 1998\)](#), [ERRATA – ACL 98-87 \(October 30, 1998\)](#)

This All-County Letter (ACL) provides clarifications regarding existing Protective Supervision policies.

Protective Supervision Regulations

Protective Supervision regulations are based on Welfare and Institutions Code (WIC) §12300(b). The Manual of Policies and Procedures (MPP) § 30-700 contains the following sections that are specifically applicable to the assessment, and authorization of Protective Supervision:

- MPP §§ 30-757.17, .171, and .172
 - .17 Protective Supervision consists of observing recipient behavior and intervening as appropriate in order to safeguard the recipient against injury, hazard, or accident.
 - .171 Protective Supervision is available for observing the behavior of nonself-directing, confused, mentally impaired, or mentally ill persons only.
 - (a) Protective Supervision may be provided through the following, or combination of the following arrangements.
 - (1) In-Home Supportive Services program;
 - (2) Alternative resources such as ¹adult or child day care centers, community resource centers, Senior Centers; respite centers;
 - (3) Voluntary resources;
 - (4) Repealed by Manual Letter No. SS-07-01

REASON FOR THIS TRANSMITTAL

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

¹ Please note: Adult Day Health Care (ADHC) is now referred to as Community-Based Adult Services (CBAS).

- .172 Protective Supervision shall not be authorized:
 - (a) For friendly visiting or other social activities;
 - (b) When the need is caused by a medical condition and the form of the supervision required is medical.
 - (c) In anticipation of a medical emergency;
 - (d) To prevent or control anti-social or aggressive recipient behavior.
 - (e) To guard against deliberate self-destructive behavior, such as suicide, or when an individual knowingly intends to harm himself/herself.
- MPP §§ 30-757.173 and .174 pertains to the 24 hour-a-day need requirement and the Assessment of Need for Protective Supervision for In-Home Supportive Services Program, SOC 821, form.
- MPP § 30-756.37 Mental functioning shall be evaluated as follows:
 - .371 The extent to which the recipient's cognitive and emotional impairment (if any) impacts his/her functioning in the 11 physical functions listed in Sections 30-756.2(a) through (k) is ranked in each of those functions. The level and type of human intervention needed shall be reflected in the rank for each function.
 - .372 The recipient's mental function shall be evaluated on a three-point scale (Ranks 1, 2, and 5) in the functions of memory, orientation and judgment. This scale is used to determine the need for protective supervision.
- MPP § 30-763.33
 - .33 The need for protective supervision shall be assessed based on the recipient's individual need provided that:
 - .331 When two (or more) IHSS recipients are living together and both require protective supervision, the need shall be treated as a common need and prorated accordingly. In the event that proration results in one recipient's assessed need exceeding the payment and hourly maximums provided in Section 30-765, the apportionment of need shall be adjusted between the recipients so that all, or as much as possible of the total common need for protective supervision may be met within the payment and hourly maximums.
 - .332 For service authorization purposes, no need for protective supervision exists during periods when a provider is in the home to provide other services.

Specific Policies

To provide ongoing guidance to counties, the following information sets forth specific existing Protective Supervision policies based on CDSS interpretations of regulations and relevant court cases:

Mentally ill/Mentally impaired and Nonself-Directing

In addition to all other relevant eligibility criteria, a person must be both mentally ill or mentally impaired *and* nonself-directing to be eligible for Protective Supervision. It is not sufficient for someone to just be nonself-directing. There must also be evidence that he/she is mentally ill/mentally impaired. This policy is based on the court rulings in the *Marshall v. McMahon*, (1993) 17 Cal. App. 4th 1841, and *Calderon v. Anderson*, (1996) 45 Cal.App.4th 607, cases, and will also be reflected in forthcoming amendments to the Protective Supervision regulations found at MPP § 30-757.17.

For the purpose of Protective Supervision eligibility, nonself-direction is an inability, due to a mental illness/mental impairment, for individuals to assess danger and the risk of harm, and therefore, the individuals would most likely engage in potentially dangerous activities that may cause self-harm.

Physical Ability to Engage in Potentially Dangerous Activities

Protective Supervision recipients must be physically capable of harming themselves. In *Calderon v. Anderson*, (1996), the court held that the plaintiff was not entitled to Protective Supervision under the IHSS Program because his physical condition made it impossible for him to engage in any activities that would require observation or preventative intervention, and Protective Supervision was not available merely to provide constant oversight in anticipation of environmental or medical emergencies.

A mentally ill or mentally impaired individual who is bedridden, or in a wheelchair, is not necessarily incapable of engaging in activities that would require observation or preventative intervention under Protective Supervision. For example:

- A mentally ill/mentally impaired bedridden individual may still have the physical ability to scratch his or her face, pull at his or her G-tube, or roll out of bed, and these are activities that may require observation or intervention under Protective Supervision.
- A mentally ill/mentally impaired person in a wheelchair may, as a result of impaired judgment, forget that s/he is unable to ambulate and try to get out of his/her chair, risking injury. This behavior may also require observation and intervention under Protective Supervision.

These risks of harm are different than the types of medical emergencies/medical conditions for which Protective Supervision is not available under MPP §30-757.172, such as the potential to fall because the mentally ill/mentally impaired person experiences poor balance.

Excluded Needs and Behaviors under MPP § 30-757.172

The exclusions listed under MPP § 30-757.172 are applicable if a recipient is otherwise eligible for Protective Supervision in that s/he has the requisite mental impairment, is nonself-directing, and would likely engage in potentially dangerous activities. MPP § 30-757.172 states Protective Supervision shall not be authorized:

- (a) For friendly visiting or other social activities;

- (b) When the need is caused by a medical condition and the form of the supervision required is medical.
- (c) In anticipation of a medical emergency;
- (d) To prevent or control anti-social or aggressive recipient behavior.
- (e) To guard against deliberate self-destructive behavior, such as suicide, or when an individual knowingly intends to harm himself/herself.

If a recipient only displays needs or behaviors excluded under MPP § 30-757.172, they are not eligible for Protective Supervision. If a recipient displays self-injurious behavior that would qualify for Protective Supervision, but also displays excluded behavior(s) based on MPP § 30-757.172, they may still be eligible for Protective Supervision for the non-excluded behaviors.

For example, a recipient who displays multiple self-injurious behaviors such as attempting suicide and wandering would be eligible for Protective Supervision to intervene to prevent wandering, but not to prevent suicide attempts.

The IHSS program is not intended to prevent or control dangerous behaviors, and IHSS providers are not trained to intervene when recipients are displaying such behaviors. *The non-IHSS program remedy for suicide attempts and other dangerous behavior is still to call 911.*

Additional Excluded Needs and Behaviors

The *Calderon v. Anderson* decision states that “protective supervision is not available merely to provide constant oversight in anticipation of environmental or medical emergency, or exigent circumstances.” For example, a mentally ill/mentally impaired recipient who would not know how to exit his/her home in the event of a fire is not eligible for Protective Supervision based on that behavior (or lack of appropriate response/behavior) alone.

Assessing Children for Protective Supervision

Based on the settlements of the *Garrett v. Anderson* and the *Lam v. Anderson* superior court cases, county social workers must always:

- assess all IHSS eligible minors for a mental illness/mental impairment, and request the parent or guardian obtain available information and documentation about the existence of a minor’s mental illness/mental impairment;
- evaluate a mentally ill/mentally impaired minor in the functions of memory, orientation, and judgment, on an individualized basis;
- review any relevant information provided by the parent;
- not deny, when applicable, Protective Supervision based solely on the fact that there are no injuries;
- not deny, when applicable, Protective Supervision based solely on age;
- not deny, when applicable, Protective Supervision based solely on the fact that the minor is left home alone for a fixed period of time, like 5 minutes;
- advise parents or guardians of the availability of, and the conditions for receiving Protective Supervision; and

- not presume that services, which are otherwise compensable, will be provided voluntarily by a parent or guardian or anyone else.

As stated above, the counties must assess all eligible minors for a mental illness/mental impairment. If the child is mentally ill/mentally impaired, the following provides a four-step process for counties to use when applying the terms of the *Garrett v. Anderson* stipulated judgment:

1. Is the minor non-self-directing due to the mental illness/mental impairment? If the answer is no, then the minor is not eligible for Protective Supervision pursuant to *Calderon v. Anderson*. The county should document that because the child is self-directing, the minor does not meet the Garrett criteria of needing more supervision than another minor of the same age without a mental illness/mental impairment. If the answer is yes, move to #2;
2. If the minor is mentally ill/mentally impaired and nonself-directing, is he/she likely to engage in potentially dangerous activities? Consider here whether the minor retains the physical ability to put him/herself at risk of harm. If the answer is no, then the minor is ineligible for Protective Supervision under the *Calderon v. Anderson* court decision. The county should document that because the child is not likely to engage in potentially dangerous activities, the minor does not meet the Garrett criteria of needing more supervision than another minor of the same age without a mental illness/mental impairment. If the answer is yes, then move to question 3;
3. Does he/she also need more supervision than a minor of comparable age who is not mentally ill/mentally impaired pursuant to the *Garrett v. Anderson* court order? "More supervision" can be more time, more intensity, or both. The additional supervision required must be significantly more than routine child care, and not only be related to the functional limitations of the child, but also allow the child to remain safely in their own homes with this assistance. If the answer is no, then the minor is ineligible for Protective Supervision under the *Garrett v. Anderson* court order. The county should document that because the child does not need more supervision than another child of the same age without a mental illness/mental impairment, the minor does not meet the Garrett criteria of needing 24 hours a day of supervision. If the answer is yes, move to question #4;
4. When it is found that "more supervision" is needed, is the 24 hour-a-day of supervision needed in order for the minor to remain at home safely pursuant to MPP § 30-757.173? If the answer is yes, the minor qualifies for Protective Supervision if otherwise eligible.

As stated above, the *Garrett* settlement instructs that Protective Supervision cannot be denied based solely on the fact there are no injuries or solely based on age. However, as to step 3 above, when performing Protective Supervision eligibility determinations for infants, all infants need constant supervision and this type of case should be easy to

assess whether more supervision is needed than a infant of comparable age who is not mentally ill/mentally impaired.

Also, regarding the need for 24 hour-a-day of supervision, a minor must not be denied Protective Supervision solely because a parent leaves the child alone for some fixed period of time, like five minutes.

See [ACL 98-87 \(October 30, 1998\)](#) - Clarifying Procedures For Assessing A Minor's Need For Protective Supervision In The In-Home Supportive Services Program and the corresponding [ERRATA – ACL 98-87 \(October 30, 1998\)](#) for more detailed Information on the Garrett settlement.

It is recommended that counties document in the case file that these *Garrett v. Anderson* requirements have been met in all appropriate cases.

Routine Child Care

Protective Supervision cannot be authorized for routine child care or supervision. This policy is based on the requirement that Protective Supervision must be related to the functional limitations of the child as set forth in WIC § 12300(e)(4). This policy is also supported by MPP § 30-763.454(e), and it is CDSS' interpretation that this criteria applies to all providers, not just parent providers.

Environmental Modifications/Safety-Proofing to Eliminate Need for Protective Supervision

Environmental modifications such as removing knobs from stove or adding safety latches can be used to eliminate the need for Protective Supervision; however, they cannot be required. If the modification eliminates the hazard, then there is no longer a need for Protective Supervision, and Protective Supervision should not be authorized.

Fluctuating/Episodic Behavior

Per MPP § 30-757.173, "Protective Supervision is only available under the following conditions as determined by social service staff:

- (a) At the time of the initial assessment or reassessment, a need exists for twenty four-hours-a-day of supervision in order for the recipient to remain at home safely."

Protective Supervision requires a 24/7 need, so if the behavior in question is considered predictable, and the need for supervision is at certain times of the day like when the sun goes down, there is no Protective Supervision eligibility because there is not a 24 hour-a-day need. Alternatively, unpredictable episodic behavior (e.g. head-banging by an autistic child which is only triggered by loud noises) does meet the 24/7 requirement, as loud noises are unpredictable and the need for supervision is constant. The unpredictable episodic behavior must be frequent and long enough that constant supervision is necessary.

It is CDSS' policy that leaving a recipient alone for some fixed period of time, like five minutes, is not, by itself, a reason to deny Protective Supervision. Although this

concept is derived from language from the *Garrett* court order, it is CDSS' policy that this should apply to adults and minors alike. And potentially dangerous behaviors that still allow a person to be left alone for short periods of time should not be considered fluctuating/episodic behaviors ineligible for Protective Supervision.

Actual Injury vs. Propensity to Harm Self

It is CDSS' policy that a person does not have to suffer *actual* injury to be eligible for Protective Supervision, but only have a history of a propensity for placing him/herself in danger.

For example, a person with a documented history of nonself-direction, who has a tendency to open the front door and start walking away, does not necessarily have to make it into the street in order for this to be considered potentially hazardous behavior.

Other evidence of a propensity for placing him/herself in danger may come from doctor evaluations, Individualized Education Plans (IEPs), etc.

More than One Protective Supervision Recipient in a Home

Per MPP § 30-763.33, when two (or more) IHSS recipients are living together and both require Protective Supervision, the need shall be treated as a common need and prorated accordingly. CDSS interprets this regulation to mean that proration should only occur when the need for Protective Supervision is met in common. Thus, proration would apply to Protective Supervision only if one person is the provider for more than one recipient and the need is therefore met in common. If the recipients each have a different provider and the need is not being met in common, no proration should be applied.

Revisions to MPP § 30-763.33 are in process to clarify this proration policy.

Next Steps

To ensure the Protective Supervision regulations accurately reflect CDSS policy, CDSS is currently working on updating the Protective Supervision regulations.

If you have any questions regarding this ACL, please call the Policy and Operations Bureau at (916) 651-5350 or email to APDPolicy@dss.ca.gov.

Sincerely,

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c: CWDA