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ALL-COUNTY LETTER (ACL) NO.: 15-25

REASON FOR THIS TRANSMITTAL

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

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 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 through .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 - (4) Repealed by Manual Letter No. SS-07-01

.172 Protective Supervision shall not be authorized:

¹ Please note: Effective April 1, 2012, Adult Day Health Care (ADHC) is now referred to as Community-Based Adult Services (CBAS).

- (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 pertain 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 Impaired/Mentally Ill and Nonself-Directing

In addition to all other relevant eligibility criteria, a person must be both mentally impaired or mentally ill *and* nonself-directing to be eligible for Protective Supervision. It

is not sufficient for someone to just be mentally impaired/mentally ill, there must also be evidence that he/she is nonself-directing. 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 impairment/mental illness, 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.

However, a mentally impaired or mentally ill 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. The specific factual circumstances of the individual must be considered when determining whether s/he has the physical ability to engage in potentially dangerous activities.

For example:

- A mentally impaired/mentally ill bedridden individual may still have the physical ability to pull at his or her G-tube that requires observation or intervention under Protective Supervision.

This risk of harm is 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 impaired/mentally ill 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/mental illness, 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.

An example of an excluded need/behavior for “(b) When the need is caused by a medical condition and the form of the supervision required is medical,” is:

- A recipient who has diabetes and the need for Protective Supervision is to help if/when the recipient has an episode of hypoglycemia.

Additionally, an example of an excluded need/behavior for “(c) In anticipation of a medical emergency” is:

- A recipient who has Congestive Heart Failure and the need for Protective Supervision is in anticipation of a heart attack.

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.

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 § 30-763.456(d), 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, and should be encouraged, to eliminate the need for Protective Supervision. 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, there is no Protective Supervision eligibility because there is not a 24 hour-a-day need. Alternatively, unpredictable episodic behavior does meet the 24/7 requirement, as 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 short period of time, is not, by itself, a reason to deny Protective Supervision. Although this concept is derived from language from the *Garrett* court order, discussed below, it is CDSS' policy that this should apply to adults and minors alike; therefore, an adult or a child may be eligible for Protective Supervision in order to safeguard them from dangerous and fluctuating/episodic behavior, even if that behavior allows the person to be left alone for short periods of time.

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.

When reassessing for Protective Supervision, changes in a recipient's physical mobility

may impact their eligibility for Protective Supervision. Also, changes in a recipient's behavior or condition which indicates that s/he no longer has the same propensity to engage in potentially dangerous activities may impact their eligibility for Protective Supervision.

When the county discontinues Protective Supervision, it must establish the factual basis for the discontinuance.

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:

1. assess all IHSS eligible minors for a mental impairment/mental illness, and request the parent or guardian obtain available information and documentation about the existence of a minor's mental impairment/mental illness;
2. evaluate a mentally ill/mentally impaired minor in the functions of memory, orientation, and judgment, on an individualized basis;
3. evaluate a mentally ill/mentally impaired minor even if there are no previous injuries;
4. evaluate a mentally ill/mentally impaired minor regardless of age;
5. assess whether the minor needs more supervision because of his/her mental impairment than a minor of the same age without such an impairment;
6. evaluate a mentally ill/mentally impaired minor even if the minor can be left home alone for a fixed period of time;
7. review any relevant information provided by the parent;
8. advise parents or guardians of the availability of, and the conditions for receiving Protective Supervision; and
9. 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, which include anyone up to the age of 18 years old, for a mental impairment/ mental illness. If the child is mentally impaired/mentally ill, 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 nonself-directing due to the mental impairment/mental illness? If the answer is no, then the minor is not eligible for Protective Supervision pursuant to *Calderon v. Anderson* and *Marshal v. McMahon*, and Protective Supervision should not be granted. 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 impairment/ mental illness. Counties should also document the underlying facts which are basis for this determination. If the answer is yes, then move to question 2;
2. If the minor is mentally impaired/mentally ill 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 not eligible for Protective Supervision under the *Calderon v. Anderson* court decision, and Protective Supervision should not be granted. 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 impairment/mental illness. 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 impaired/mentally ill 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 home with this assistance. If the answer is no, then the minor is not eligible for Protective Supervision under the *Garrett v. Anderson* court order, and Protective Supervision should not be granted. The county should document that because the child does not need more supervision than another child of the same age without a mental impairment/mental illness, the minor does not meet the Garrett criteria of needing 24 hours-a-day of supervision. If the answer is yes, then move to question 4;
4. When it is found that “more supervision” is needed, is 24 hour-a-day supervision needed in order for the minor to remain at home safely pursuant to MPP § 30-757.173? If the answer is no, then the minor is not eligible for Protective Supervision and it should not be granted. If the answer is yes, the minor qualifies for Protective Supervision, if otherwise eligible.
 - o Remember that a 24-hour care plan is needed to enumerate how the recipient will be protectively supervised for any hours above those that are provided by IHSS or Alternative Resources.

It is recommended that counties document in the case involving a person up to the age of 18 years old that these *Garrett v. Anderson* requirements have been met in all appropriate cases. The above 4-step process can be used as a template in the case narrative.

Next Steps

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

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

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Sincerely,

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c: CWDA