Improving the Developmentally Disabled Community One Family at a Time.

November 7, 2023

California Department of Social Services
Office of Regulations Development (ORD)
744 P Street, M.S. 8-4-192
Sacramento, CA 95814

VIA FEDEX OVERNIGHT MAIL, EMAIL & FAX

RE: (ORD #0822-06) Notification of 15-Day Public Availability of Changes to Regulations and Supporting Documents and Information – Protective Supervision Proration, Nonself-Direction Clarification, and Nonself-Directing Definition – *IHSSadvocates* RESPONSE

Dear ORD:

First and foremost, this advocate would like to thank CDSS for the opportunity to provide public comment as to the modified language proposed via ORD #0822-06.

The IHSS program, administered by CDSS, is arguably the best program of its kind in the country. This advocate would like to recognize the wonderful staff members and training teams at both the State and county levels. However, even with such well-trained and well-skilled individuals administering the IHSS program, the program still has opportunities for better execution. As the United States Constitution seeks to "form a more perfect union," my objective here is to encourage/persuade CDSS to form a more perfect program.

This advocate proposes an alternative for consideration that is, in part, already being utilized by county and State staff members. This alternative for consideration would be more effective in carrying out the purpose for which the regulations are proposed and/or would be less burdensome to affected private persons. The proposed action would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

CDSS is attempting to apply a qualitative response to an issue that already has a quantitative solution. Unfortunately, parts of the proposed solution are found in policy advisements only, and the regulatory component is not expressly supported by statute. This is where the change is required.

The Manuals of Policy and Procedure contain the following regulation:

MPP 30-756.37 Mental functioning shall be evaluated as follows:

> ".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.
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> NOTE: Authority cited: Sections 10553 and 10554, Welfare and Institutions Code; and Chapter 939, Statutes of 1992. Reference: Section 12309, Welfare and Institutions Code; and the State Plan Amendment, approved pursuant to Section 14132.95(b), Welfare and Institutions Code."

Analysis of the Problem

The problem is, there is no uniform policy for what consequences a particular score would create. Neither statute nor regulations provide any uniform indication on what outcomes would result from a particular cumulation of data points pertaining to an individual's memory, orientation, and judgment scores.

Unlike the determination of the outcome of an election or a sporting event, how much is owed on one's personal income taxes, achieving college credit on an advanced placement exam, testing to maintain one's California driver's license (along with many other examples), the application of functional index ranking outcomes for memory, orientation, and judgment is an arbitrary determination that is not currently being uniformly implemented statewide.

This advocate is accustomed to participating as an authorized representative in scores of administrative hearings each year. The advocate's firm, ***IHSSadvocates***, is recognized as a "super user" on ACMS by CDSS. I have personal knowledge of cases where individuals were found to be "not-non-self-directing" with a judgment score of 5 (severely impaired) and a combined functional index ranking of 8. I am aware of a multitude of individuals who have been prematurely denied a bona fide review of Protective Supervision ("PS") need because the ALJ stopped the determination process following a finding of the individual's combined functional index ranking as being 6. One such ALJ even included the following finding of facts when determining a recipient to be "not-non-self-directing" and prematurely denying a proper review:

> "On the other hand, the child continually engages in self-harm behaviors such as head banging, biting and running into walls. These behaviors appear to be unrelated to regular tantrums, and have a frequency and intensity that arguably goes beyond typical three-year-old behavior. Thus, these behaviors demonstrate moderately impaired judgment in that a 3-year-old would be expected to identify pain associated with the behaviors and refrain from continually engaging in them to such a degree.
>
> Therefore, considering the evidence as a whole, and the fact that the child is only 3 years old, the child is found to be moderately impaired in the area of judgment and a rank 2."

This is Wrong

Several Superior Court Judges have already determined that CDSS has created an illegal barrier by requiring an individual to be both non-self-directing and mentally infirm. This is what this proposed change in the regulations is truly about. CDSS seeks to reduce the large volume of Superior Court filings related to the "illegal barrier" issue without addressing the real problem.

Whereas an ALJ has a responsibility to review evidence and testimony with the purpose of making legal findings, an ALJ does not have the authority to arbitrarily determine the protocol associated with the administration of a test instrument. As the test instrument was created by a regulation, the protocol should be uniformly determined by CDSS via policy interpretation, regulation, or as a law by statute.

The creation of a qualitative definition of non-self-direction does nothing to fix the true problem. This advocate fully recognizes CDSS's desire to create their proposed regulatory change; however, the definition needs to be made in a quantifiable form, uniformly determined by CDSS, not in a qualitative form, arbitrarily determined by an ALJ. ALJs would still be responsible for determining the individual functional index ranking scores. The result of these combined individual scores would be calculated, and a minimum score would be required to continue to the next step in the review process.

The Solution is Already a Policy

Pursuant to All County Letter ("ACL") 88-118, item #16, the approval of PS almost always required a combined functional index (FI) rank of greater than 6, as follows:

> "How does the Uniformity system assist workers in determining the need for Protective Supervision? A client's mental functioning is evaluated on a 3-point scale in the areas of Memory, Orientation and Judgment. Clients are ranked 1, 2 or 5. Generally, we would expect that clients who rank at least one 5 would be at risk without being supervised. Conversely, even if a client ranks 2 in all three areas of mental functioning, it would be unlikely for him/her to need protection. There will be exceptions. For example, if a client ranks 5 in one or more areas and is also bed bound, he/she may be unable to perform those activities which put him/her at risk. Therefore, Protective Supervision would not be needed."

However, beginning in 2014 with the inception of the Community First Choice Option ("CFCO"), the Nursing Facility Level of Care changed this standard to 6 or greater (ACL 14-60, pages 2-4), as follows:

> "CFCO Eligibility
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> All CFCO participants must be eligible for Full-Scope, Federal Financial Participation (FS FFP) Medi-Cal (as in the PCSP and the IPO programs), and meet CFCO NF LOC eligibility based on one of the following criteria:
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> 1. Have a total assessed need (excluding heavy cleaning and yard hazard abatement) of 195 or more IHSS hours per month.
>
> 2. Have a total assessed need (excluding heavy cleaning and yard hazard abatement) under 195 IHSS hours per month and:
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> * Have 3 or more of the following services with the designated Functional Index (FI) Ranks:
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> o Eating, FI Rank of 3-6
> o Bowel and bladder/menstrual care, FI Rank of 3-6
> o Bathing/grooming, FI Rank of 4-5
> o Dressing, FI Rank of 4-5
> o Mobility inside, FI Rank of 4-5
> o Transfer, FI Rank of 4-5

o Respiration, FI Rank of 5-6
o Paramedical, (FI Rank not applicable)

OR

*** Have a combined FI Rank of 6 or higher in mental functioning (memory, orientation, and judgment). FI Ranks for mental functioning can be either 1, 2, or 5.**

3. Have a combined "Individual Assessed Need" total of 20 hours or more per week in one or more of the following services:

* Preparation of meals
* Meal clean-up (if preparation of meals and feeding are assessed needs)
* Respiration
* Bowel and bladder care
* Feeding
* Routine bed baths
* Dressing
* Menstrual care
* Ambulation
* Transfer
* Bathing, oral hygiene, grooming
* Repositioning and rubbing skin
* Care and assistance with prosthesis
* Paramedical services

The above NF LOC criteria were developed by DHCS in consultation with CDSS. The new CFCO eligibility requirements are more stringent than those in effect from December 1, 2011 through June 30, 2013; therefore, individuals with FS FFP Medi-Cal eligibility who were, but are no longer, eligible for CFCO, due to the NF LOC criteria, will be served in the PCSP or IPO programs, effective July 1, 2013.

Please note that, as in the IPO program, recipients in CFCO may also receive Restaurant Meal Allowance, Advance Pay, service(s) provided by a recipient's spouse, and service(s) provided by a minor recipient's parent.

Required Services in CFCO

The four required services in CFCO are:

1. Assistance with Activities of Daily Living (ADLs), Instrumental Activities of Daily Living (IADLs), and health-related tasks, which currently include:

* Personal Care Services
* **Protective Supervision**
* Domestic and Related Services
* Paramedical Services
* Medical Accompaniment
* Heavy Cleaning
* Yard Hazard Abatement" [emphasis added]

If the ALJ's findings indicate an Fl ranking of 6 or higher, the ALJ is obligated to decide whether a recipient required more supervision (not "significantly" more, as the original Court Order (Case Number 712208) is absent the term "significantly") than a typical child of the same age without a mental impairment. (Garrett v Anderson, 1998). Accordingly, this advocate contends that an ALJ's Fl rankings of 6 or higher would trigger this requirement. *Per Garret v. Anderson*:

> "C) A county must assess the minor's need for protective supervision if minor has a mental impairment including by taking the following steps:"
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> > "(3) Determine whether a child needs more supervision because of his mental impairment than a child of the same age without such an impairment. (WIC § 12300, subd. (d) (4).)"

The combination of MPP 30-756.372 and ACL 14-60 creates the perfect tool for determining whether an individual is worthy of the continued PS analysis discussed in ACL 15-25 beyond step 1. The Nursing Facility Level of Care, as it relates to mental functioning, should be incorporated into the regulations.

Integrating This Change With the ACL 15-25 "4-Step Process"

Each step has a distinct purpose. The administration of the "4-step process" described in ACL 15-25 is akin to following a recipe for baking a birthday cake. Everything has its proper place and order. If you apply the frosting before the cake goes into the oven, the cake is ruined. With this being said, the advocate wishes to add these additional points:

1. Age should not be a factor in steps 1 and 2. The Garrett v. Anderson stipulated court order (1998) provides a solution to the issue of factoring in age for minor applicants. One of the stipulated court-ordered provisions is step 3 in this analysis. If an applicant is at risk of harm due to potentially self-endangering behavior and the combined functional index ranking is 6 or higher **without consideration of age**, then step 3 will determine whether the need for supervision is greater than that of a comparable child of the same age without a mental impairment.

2. Predictability of behavior is not a reason to find an individual "not non-self-directing". This advocate has seen the following language used in more than one administrative law decision. The advocate believes this interpretation over-reaches MPP 30-757.173. The boiler plate quote reads as follows:

> "Predictability is not limited to a specific time on the clock but includes circumstances such as every time the parent does X; the child does Y. The parent can predict or anticipate the need and stand ready to intervene following their demand, direction, or denial. It is at a predictable time that the need does not exist if the adult does not impose the demand, direction, or denial. Regarding the question of need for 24-hour observation and intervention to remain safely in the home, we look to see if the dangerous behavior, if any, is at a predictable time, infrequent or limited to times when the provider is present to support tasks covered under other IHSS categories."

MPP 30-757.17 states that:

> "Protective Supervision is available for observing recipient behavior and intervening as appropriate…".

MPP 30-757.173 states that:

> 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.

MPP 30-757.173 makes no exclusions as to behaviors that require monitoring and intervening on a repetitive basis due to their reoccurring, anticipated nature. For a behavior to be described as "predictable," it must happen with sufficient frequency that a third-party individual would characterize it to be "in anticipation." If the concern that the behavior being "anticipated" was due to a medical emergency, then it would be excluded via MPP 30.757.172(c); however, there is no such exclusion for behavior that is caused by a mental impairment.

In addition, no plain language advisements or regulations discuss PS denial when similar, yet mutually exclusive behaviors happen at different times of the day or in different settings. In their totality, these behaviors create a heightened supervision requirement. When analyzed in their totality, these types of behaviors can create a level of supervision that meets the requirements of the "4-step process" discussed in ACL 15-25.

ACL 15-25 states that PS is denied if "the need for supervision is at certain times of the day." Specific behaviors are not predictable if they do not consistently occur exclusively at the same time of the day.

Thank you for allowing me to contribute my opinion during this public comment period. I look forward to hearing CDSS's response to my feedback.

Sincerely

Larry Rosen
Partner
IHSSadvocates