

HOW TO SECURE IHSS PROTECTIVE SUPERVISION

A COMPLETE GUIDE



IHSS Law Office

of James Diskint

Reliability • Empathy • Advocacy

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ABOUT THIS GUIDE

This guide was prepared by the IHSS Law Office of James Diskint, which is dedicated to helping families throughout California secure protective supervision and other in-home supportive services (IHSS). We believe that each person deserves the dignity of being able to live safely at home.

This guide is intended to provide general information to anyone interested in securing protective supervision. The information in this guide is not legal advice and should not be used as a substitute for quality representation.

1. WHAT IS PROTECTIVE SUPERVISION?

Protective supervision is a program under In-Home Supportive Services (IHSS) that provides support to California residents, with a mental impairment or mental illness so they can live safely at home. An IHSS caregiver, known as a provider, monitors the recipient's behavior and intervenes to prevent harm from injuries, hazards, or accidents. Like all in-home supportive services, protective supervision provides an alternative to out-of-home care for Medi-Cal eligible recipients.



Protective supervision provides the most hours of any supportive service, as eligible recipients are entitled to either 195 hours per month (for non-severely impaired recipients) or 283 hours per month (for severely impaired recipients). Eligible service providers, including parents, can potentially earn around

\$4,000 per month, tax-free. To qualify as “severely impaired,” an applicant must need at least 20 total hours per week of services in one or more of the following IHSS areas: non-medical personal services, preparation of meals, meal cleanup (when preparation of meals and feeding are also required), and paramedical services.

County welfare departments administer the IHSS program under the oversight of the California Department of Social Services. The county welfare departments process applications for IHSS assistance, determine the needs of applicants, and authorize services.

2. WHAT ARE THE ELIGIBILITY REQUIREMENTS?

Protective supervision is available for both adults and minors (18 and under). Most of the requirements apply to all applicants, regardless of age. The individual must:

- **be nonself-directing due to a mental impairment or mental illness;**
- **be likely to engage in potentially dangerous activity; and,**
- **need 24-hour-a-day supervision in order to remain safely at home.**

For minors, there is an additional requirement. The minor must also:

- **need more supervision than a minor of comparable age who is not mentally impaired or mentally ill.**

What does “nonself-directing” mean?

Nonself-directing means “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.” (All County Letter (ACL) No. 15-25.) Examples of nonself-directing behaviors include, but are not limited to:

- Touching the hot stove;
- Eloping/wondering off from home;
- Head-banging;
- Mishandling sharp objects;
- Climbing to high places;
- Misusing the microwave;
- Eating inedible objects; and
- Playing with electrical outlets.

Keep in mind that the definition of “nonself-directing” is very different in the IHSS context than its commonly understood meaning.

Typically, nonself-directing refers to a person’s inability to make decisions without external control. For example, the term “self-directing” in the IEP context might refer to a child who is able to draw with markers without instruction or assistance.

The applicant's mental functioning is evaluated by considering the extent to which the applicant's cognitive and emotional impairments impact activities of daily living, and by considering the applicant's memory, orientation, and judgment on a three-point scale (Ranks 1, 2, and 5). The applicant's mental functioning is evaluated by considering the extent to which the applicant's cognitive and emotional impairments impact activities of daily living, and by considering the applicant's memory, orientation, and judgment on a three-point scale (Ranks 1, 2, and 5).

- **Memory** refers to the ability to recall learned behaviors and information from the past. Examples of a severe memory deficit include forgetting to start or finish activities of daily living which are important to the individual's health and/or safety; the individual cannot maintain much continuity of thought in conversation; the individual does not remember his age, address, day of the week, etc.;
- **Orientation** refers to an awareness of time, place, self and other people in one's environment. Examples of severe disorientation include wandering off; inability to identify significant others or relate safely to one's environment or situation; no sense of time of day; a lack of awareness of the purpose of the social worker's visit.
- **Judgment** means the ability to make decisions so as not to put one's self or property in danger, which entails an understanding of risks involved and consequences. Examples of severely impaired judgment include making decisions without regard to safety or well-being, such as an inability to comprehend safety around the stove.

Applicants with severe deficits in memory, orientation, and judgment are more likely to qualify for protective supervision than applicants with moderate deficits.

What does "likely to engage in potentially dangerous activity" mean?

An applicant is never required to suffer an actual injury in order to be eligible for protective supervision. Instead, the applicant must show a propensity for placing him/herself in danger. For example, an applicant with a documented history of nonself-directing behavior, 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 dangerous behavior.

However, the definition of "nonself-directing" already includes the requirement that the individual will most likely engage in potentially dangerous activities. Therefore, it is a bit confusing and repetitive for the California Department of Social Services (CDSS) to include an additional requirement that the individual must be likely to engage in

potentially dangerous activities. The guidance CDSS offers for this requirement is to consider whether the applicant retains the physical ability to put him/herself at risk of harm. (ACL No. 15-25.)



All protective supervision recipients must be physically capable of harming themselves. If the applicant's physical condition makes it impossible to engage in any dangerous activities that would require oversight and intervention, then the applicant is not eligible for protective supervision. For example, a fully paralyzed

person is not capable of putting himself/herself at risk of harm. On the other hand, a person who is confined to bed may still have the physical ability to pull at his/her gastrostomy tube, which would be dangerous and require protective supervision.

How do I fulfill the 24-hour-a-day requirement?

Of course, no applicant engages in potentially dangerous activity every minute of every day. The 24-hour-a-day requirement means that the dangerous behaviors are frequent and unpredictable so that constant oversight is necessary.

For example, if a child repetitively touches a hot stove, it would likely be considered a dangerous behavior. If, however, the child only touches the hot stove when the parent is cooking, then it may well be considered a predictable behavior (as the parent knows when the child may attempt the behavior). As a result, this particular dangerous behavior might not qualify for protective supervision, because it likely does not require 24-hour-a-day oversight. However, in a situation where the child also knows how to turn the hot stove on by himself/herself, so that the child touches the hot stove at frequent, random times, then this dangerous behavior would likely satisfy the 24-hour-a-day requirement. Note that it is CDSS' policy that leaving an applicant alone for some fixed short period of time, is not, by itself, a reason to deny protective supervision.

How is protective supervision determined for minors?

As previously explained, in addition to the trio of requirements noted above, a minor must also need more supervision than a neurotypical child of the same age in order to qualify for protective supervision. “More supervision” means that the child must require more time and/or more intensity of supervision than a neurotypical child of the same age.

For example, a parent might safely let a neurotypical child play independently in a different room for an extended period of time, while a parent of a nonself-directing minor of the same age may have to be significantly more vigilant in order to prevent the child from harm.

A nonself-directing child usually requires considerably more intervention from a provider than a neurotypical child. Note that there is no minimum age requirement for protective supervision.

Exceptions to Protective Supervision Eligibility

Protective supervision is not available in the following situations:

- For friendly visiting or other social activities;
- Routine childcare;
- When the need is caused by a medical condition and the form of the supervision required is medical.
 - For example, an applicant with diabetes is not eligible for protective supervision to help when the applicant has an episode of hypoglycemia.
- In anticipation of a medical emergency.
- To prevent or control anti-social or aggressive behavior directed toward others.
 - For example, hitting one’s siblings or peers.
- When an applicant deliberately intends to harm him/herself.

3. WHAT DOCUMENTATION DO I NEED?

Providing the proper documentation is the most critical component of securing protective supervision, whether at an assessment or on appeal. Administrative law judges and county social workers are required to consider the totality of the evidence, so the more supporting documentation you provide, the stronger the case.



The required documentation for protective supervision varies depending on whether you're applying on behalf of a minor or an adult. You should provide the following documentation:

- **Assessment of Need for Protective Supervision (SOC 821);**
- **Individualized Education Program (IEP)** (if the applicant is a minor);
- **Regional Center Documents**, such as an Individual Program Plan (IPP) and Individualized Family Service Plan (IFSP) (if the applicant is a client of a regional center);
- Any other **Evaluation** or **Report** that shows the applicant attempts to engage in dangerous behaviors and has difficulty assessing harmful situations;
- **Letters from Potential Witnesses;**
- **Dangerous Behavior Log;**
- **Authorized Representative Form** (if you retain an attorney or other representative).

Assessment of Need for Protective Supervision

This IHSS form asks the applicant's health care professional to assess the applicant's memory, orientation, and judgment. Generally, applicants who are determined to have severe deficits in their mental functioning are more likely to qualify for protective supervision. Provide the doctor with specific examples of the applicant's dangerous behaviors and deficiencies in memory, orientation, and judgment. The health care professional you choose should ideally be someone who has seen the applicant for an extended period of time, not just an appointment or two.

IEPs

If the applicant is a minor, review past IEPs. You should highlight any references to behavior goals, behavior plans, behavioral aides, safety concerns, and any examples of the applicant requiring more oversight than a neurotypical child of the same age.

Regional Center Documents

If the applicant is a minor and client of a regional center, provide relevant regional center documents, such as an IPP or IFSP. Also, make sure to highlight any behavior and safety concerns.

Other Evaluations or Reports

You should provide any other documentation, including evaluations and reports, that show that the applicant engages in dangerous behavior or has difficulty assessing potentially harmful situations. For example, a psychological evaluation that discusses the applicant's mental functioning could prove to be very helpful.

Letters from Potential Witnesses

If a caregiver, aide, teacher, or other professional has spent a considerable amount of time with the applicant, especially in a professional capacity, you should ask that potential witness to write a letter in support of the application. The letter should state how the witness knows the applicant and it should describe first-hand observations regarding the applicant's mental functioning and/or dangerous behaviors. For example, an applicant's behavioral aide could write a letter describing the aide's observations of the applicant engaging in dangerous behaviors in school, such as eloping from the classroom.

Dangerous Behavior Log

You should diligently keep a dangerous behavior log for at least three weeks. Document the applicant's dangerous behaviors, including any attempted dangerous behaviors. For example, if your child tries to escape from home, tries to eat something inedible, tries to touch the hot stove, etc., but you prevent it from happening, you should record that incident. Be sure to include the date of the incident, a brief description of the incident, and how many times per day it occurred. The more entries you include in the log, the stronger your case for protective supervision becomes.

Authorized Representative Form

If you retain an attorney or advocate to help you with your protective supervision case, IHSS requires an authorized representative form.

Your ability to provide convincing documentation may very well make or break your case for protective supervision. If there are any discrepancies or inaccurate information in the documentation, you should seek to get the documents corrected prior to submitting them to the county social worker, county hearing representative, or administrative law judge.

4. HOW DO I APPLY?

To apply for Protective Supervision, first complete the Application for In-Home Supportive Services, also known as SOC 295. The application is also available in other languages, including, but not limited to: SOC 295 in Spanish; SOC 295 in Chinese; and SOC 295 in Armenian.

Next, submit the application to your county IHSS office. After you submit your application for protective supervision, your county IHSS office will contact you to schedule an assessment. Generally, the county must process your application and mail you a notice of action within 30 days from when you completed the application

5. WHAT HAPPENS AT THE ASSESSMENT?

After you apply for protective supervision for your loved one (the applicant), a county social worker will schedule a home visit to determine the applicant's need for protective supervision. The home visit is an important part of the initial assessment, which forms the basis of the county's decision to authorize or deny protective supervision. Counties conduct reassessments annually, although you can request a reassessment at any time.

During the home visit, the county social worker makes observations and gathers information. The social worker assesses the applicant's physical and mental functioning, living situation, and ability to perform activities of daily living. The social worker also asks questions regarding the applicant's safety and well-being. For example, the social worker should inquire about the applicant's dangerous behaviors.

The social worker will also review all relevant documentation you provide. This is a valuable opportunity to support your case for protective supervision, because social

workers don't always have the opportunity to observe the applicant's dangerous behaviors during the short home visit, an unfortunate circumstance which can lead to a denial.

6. HOW DO I APPEAL THE COUNTY'S DENIAL?

If you disagree with the county's denial of protective supervision, you have the right to appeal. An appeal means that an administrative law judge will review your case at a hearing, unless the county offers you a conditional withdrawal in order to reassess the applicant.

It is important to remember that you have 90 days from the date of the Notice of Action (NOA) to submit your appeal. You can request your hearing to take place in person, over the phone, through video, or, if you cannot get to a hearing site because you have a disability or if other extenuating circumstances apply, you can request to have the hearing at your home, facility, or other location. If you prefer speaking in a language other than English, specify which language in your request. You are entitled to an interpreter at the hearing, free of charge.

If you are already receiving protective supervision and the NOA rescinded your eligibility, you should request a hearing prior to the date when the change takes effect. This is called "aid paid pending" and ensures that you maintain the same number of IHSS hours until the appeal is decided.

You can appeal your denial of protective supervision by:

- Online Appeals Account: <https://acms.dss.ca.gov/acms/>
- Phone: Call the State Hearings Division at 1-800-952-5253. For hearing or speech impaired persons who use TDD, call 1-800-952-8349.
- Mail: You can also simply fill out the hearing notification page of the Notice of Action and mail it to:

State Hearings Division
California Department of Social Services
P.O. Box 944243, Mail Station
6-16-50 Sacramento, CA 94244

The county must send you its statement of position at least two working days before the hearing. If the county fails to do so, you can ask the State Hearings Division to postpone

the hearing. You can also request a postponement due to unexpected emergencies, among other reasons.

Prior to and during the hearing, you have the right to examine the county's nonprivileged information that it used in making its decision to deny protective supervision.

7. WHAT HAPPENS AT THE HEARING?

Your hearing for protective supervision will either be in person or over the phone. An administrative law judge will manage the hearing. To defend the county's position, a county hearing representative will attend the hearing, often accompanied by a county social worker.

1. The administrative law judge will begin by introducing the parties and providing an overview of the hearing process. The judge will ask all parties to swear, under oath, that their testimony will be truthful.
2. Typically, the judge will ask the county hearing representative if he/she would like to make an opening statement. If you have an authorized representative, the judge will ask if he/she would like to make the applicant's opening statement.
3. After opening statements, the administrative law judge will then likely hear testimony from all relevant witnesses. The county's social worker will explain his/her assessment and seek to justify the county's denial of protective supervision. You or your authorized representative will be given an opportunity to cross-examine the county social worker.
4. You will then be given an opportunity to provide testimony. After your testimony, the county's hearing representative is allowed to cross-examine you. At any point during the hearing, the administrative law judge may question the parties. You should be prepared to discuss each of the requirements for protective supervision, as well as any documentation you provide for your case.
5. After all testimony is given, the administrative law judge may ask the parties if they would like to make a closing statement, which concludes the hearing.

8. HOW DO I REQUEST A REHEARING?

If you believe that the administrative law judge made an error in the decision to deny you protective supervision, you have the right to request a rehearing within 30 days of the decision. All rehearing requests are made to the California Department of Social Services, State Hearings Rehearing Unit. The reasons to request a rehearing include:

- The decision is inconsistent with the law;
- The decision is not supported by the evidence in the record;
- The decision is not supported by the findings;
- The decision does not address all of the claims or issues raised by the parties;
- The decision does not address all of the claims or issues supported by the record or evidence;
- The decision does not set forth sufficient information to determine the basis for its legal conclusion;
- Newly discovered evidence, that was not in custody or available to the party requesting rehearing at the time of the hearing, is now available and the new evidence, had it been introduced, could have changed the outcome; and,
- For any other reason necessary to prevent the abuse of discretion or an error of law.

Your request for a rehearing should:

- List the date you received the decision;
- Explain why a rehearing should be granted;
- Request an interpreter in your preferred language, if applicable; and
- If you want to submit new evidence:
 - describe the new evidence;
 - explain why you did not provide it for the hearing;
 - explain why you think the new evidence would change the decision; and,
 - submit a copy of the new evidence, if possible. You can submit your rehearing request by:

Online Appeals Account: <https://acms.dss.ca.gov/acms/>

Email: SHDRhearings@dss.ca.gov

Fax: (833) 281-0908

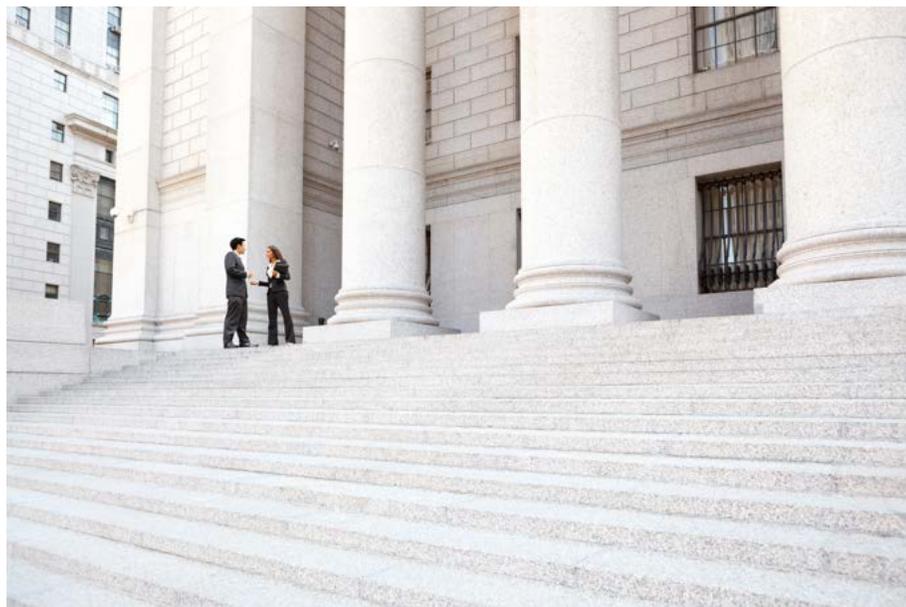
Mail: (Allow at least five days for mailing. Keep your originals.) State Hearings Division, PO Box 944243, MS 21-36 Sacramento, CA 94244-2430

Upon receipt, the State Hearings Division must grant or deny your rehearing request within 35 working days.

9. HOW DO I SEEK STATE COURT REVIEW?

You can seek court review of the administrative law judge's decision by filing a writ petition (also known as a writ of administrative mandate) against the California Department of Social Services (CDSS) in Superior Court.

The goal of the writ petition is to convince the court to set aside the administrative law judge's decision. Keep in mind that you have one year from the date of the decision to seek court review.



You can file a writ petition if you think CDSS did not provide you with a fair hearing, that there was a prejudicial abuse of discretion, or other errors. "Abuse of discretion" means that the administrative law judge did not proceed in a manner required by law, the decision was not supported by the findings, or the findings were not supported

by the evidence. For example, if the administrative law judge found that the applicant was able to assess danger, but you provided documentation that showed otherwise, then the judge's findings may not have been supported by the evidence

There are three possible outcomes of your writ petition:

1. The court agrees with CDSS and denies your writ petition;
2. The court agrees with you that the administrative law judge made some kind of error, and the court grants you protective supervision and/or other supportive services; or,
3. The court agrees with you that the administrative law judge made some kind of error, but determines that there is not enough evidence for the court to decide the issue and sends (remands) the case back to CDSS for a rehearing.

CDSS will pay for your attorney's fees if you succeed in setting aside the administrative law judge's decision.

10. CAN I HIRE A LAWYER TO HELP?

It can be challenging to secure protective supervision. The State of California and its counties have an interest in ensuring that only the most qualified applicants are approved, because protective supervision is the most expensive IHSS program. Although applicants can successfully secure protective supervision on their own, many applicants are denied protective supervision due to a lack of proper documentation and understanding of the eligibility requirements. In some cases, the county misinterprets the law or facts. For example, a county social worker might say that the applicant is too young to receive protective supervision, even though there is no minimum age requirement. For many applicants, it can seem like an uphill battle to secure protective supervision.

You can hire an attorney to help you secure protective supervision at any stage of the process, from assessment to appeal to court review. The California Department of Social Services allows you to have an authorized representative at your hearing, whether an attorney, advocate, family member, or friend. If you're interested in hiring an attorney but don't want to pay the fees unless you win, make sure you find an attorney that offers a contingency fee.

