JUSTICE IN AGING
FIGHTING SENIOR POVERTY THROUGH LAW

BET TZEDEK
JUSTICE FOR ALL

Disability Rights California
California's protection & advocacy system

December 21, 2018

Office of Regulations Development
Department of Social Services
744 P Street, MS 8-4-192
Sacramento, CA 95814
ord@dss.ca.gov

Via Email

Re: Comments on ORD #0915-11: In-Home Supportive Services Paramedical Regulations Requirement

Dear Office of Regulations Development:

Disability Rights California, Justice in Aging, and Bet Tzedek Legal Services strongly urge the Department of Social Services to withdraw the proposed regulations in ORD #0915-11 and to work with consumer stakeholders and advocates to ensure that the paramedical regulations reflect the needs of IHSS consumers. If the Department does not withdraw the proposed regulations, we propose the Department extend the deadline for accepting comments because the current deadline falls during the winter holidays and many interested and concerned stakeholders will be unable to submit comments.

We submit the following comments in response to the proposed changes to Manual of Policies and Procedures (MPP), Division 30, sections 30-701 (Definitions), 30-756 (Need), and 30-757 (Program Service Categories and

Time Guidelines) regarding paramedical services in the In-Home Supportive Services (IHSS) program.

Disability Rights California is California's independent, federally mandated system to advocate for the legal, civil and service rights of people with disabilities throughout the state. Justice in Aging is a national nonprofit that uses the power of the law to fight senior poverty by securing affordable health care and economic security for older adults with limited resources. Bet Tzedek Legal Services provides free legal assistance to eligible low-income residents regardless of their racial, religious, or ethnic background. Among other things, Bet Tzedek litigates and advocates to protect and promote low-income older adults' access to critical health care benefits, including In-Home Supportive Services (IHSS).

I. General Concerns Regarding Proposed Changes

We strongly object to the proposed changes to the Department of Social Services Manual of Policies and Procedures (MPP) sections 30-701, 30-756, and 30-757, and ask that they be withdrawn in order to allow meaningful stakeholder engagement for the following reasons:

a. There is no reasonable justification of the need for the proposed regulations. The proposed regulations will give rise to an increased and more complicated and expensive bureaucracy.
b. The regulations fail to consider the role of the IHSS consumer and primary caregivers in directing care.
c. The Department seeks to develop an exhaustive list of timeframes for paramedical services outside the regulatory process. If in fact such guidelines are needed, they must be developed in the context of the regulatory process as was done with the hourly task guideline ranges for nonmedical personal care services.
d. While the Department states that it invited interested parties to present alternatives to the proposed regulations and held workgroups with counties, stakeholder and advocacy groups, our agencies and others have not had the opportunity to review these regulations or offer edits before they were formally released for comments through the Office of Administrative

Law. It is also unclear whether the Department consulted with the provider/consumer community. Groups including IHSS beneficiaries and relative providers who we and our advocacy partners contacted indicated they only heard about proposed changes to the paramedical regulations when contacted by our advocacy partners.

e. Stakeholders and advocates must have an opportunity to work with the Department to develop less burdensome alternatives.

II. Specific Comments to Proposed Regulations

In addition to our concerns stated above, we disagree with numerous specific proposed changes as set forth below.

a. Section MPP § 30-701(2)(B)

We object to the restrictive list of licensed health care providers for paramedical services set forth in this section.[1] The proposed changes ignore the reality of the circle of care persons with disabilities receive from myriad providers.

---

[1] As a comparison, regarding medical certification for receipt of IHSS, Welfare and Institutions Code Section 12309.1 states that:
(a) As a condition of receiving services under this article, or Section 14132.95 or 14132.952, an applicant for or recipient of services shall obtain a certification from a licensed health care professional, including, but not limited to, a physician, physician assistant, regional center clinician or clinician supervisor, occupational therapist, physical therapist, psychiatrist, psychologist, optometrist, ophthalmologist, or public health nurse, declaring that the applicant or recipient is unable to perform some activities of daily living independently, and that without services to assist him or her with activities of daily living, the applicant or recipient is at risk of placement in out-of-home care.

(1) For purposes of this section, a licensed health care professional means an individual licensed in California by the appropriate California regulatory agency, acting within the scope of his or her license or certificate as defined in the Business and Professions Code.

Numerous examples demonstrate that these limitations are inappropriate. For instance, while a physician would recognize the need for occupational or physical therapy (OT/PT), it is the occupational or physical therapist who would provide the directions with respect to a home program of therapy which may include range of motion. Likewise, in the context of the California Children's Services program, a parent accompanying a child receiving OT/PT services at a Medical Therapy Unit will receive instructions about implementing a home therapy program which would be expected to be modified at subsequent hands-on therapy sessions.

And while a physician would recognize a need for ventilator care, in the context of ventilator users, it would be a Licensed Vocational Nurse (LVN) or respiratory therapist or RN experienced in managing ventilator users who would actually provide the training on managing the ventilator, adjusting the rate, and being able to respond in the event of an emergency.

b. <u>Section 30-701(r)(1)</u>

The distinction between active and passive range of motion is artificial. A home therapy program can range between monitoring and providing direction (including through touching) to ensure correct form and prevent injury to the manipulation provided by another person. We propose the Department continue to categorize all range of motion within the Repositioning and Rubbing Skin service.

c. <u>Section 30-756.2(j)</u>

The current provision in subjection (j) regarding feeding should be preserved because the actions of eating and feeding are distinct. We suggest that the entry be "feeding and/or eating" or create separate sections for feeding and eating. We have worked with consumers who required the manual manipulation of the jaw to enable the person to chew and touching to trigger a swallow, which we consider eating, not feeding.

d. <u>Section 30-756.4</u>

We agree with the rank of 6 for tube feeding. However, there needs to be an explanation about what can be covered within the scope of "paramedical" in this context. For instance, we have worked with consumers whose caregivers individually prepare some of their g-tube meals rather than rely solely on formulas. In these cases preparing individual liquid meals should be included.[2]

e. Section 30-757.191 (a) and (b)

We agree with the changes in section 30-757.19(a) and (b), but we believe that some of the other propsed rule changes do not comport with this definition of Paramedical Services. Specifically, the proposed requirement that only licensed health care professional can train a provider to perform a paramedical task runs counter to section 30-757.19(a) and (b). Many consumers have the ability to direct the paramedical services they need, they just need assistance to perform the task itself. For example, many of the consumers DRC has worked with are alumni of Rancho Los Amigos National Rehabilitation Hospital ("Rancho"). Part of the training the Rancho alumni receive concerns monitoring their own needs in order to direct caregivers and to provide specific instructions on the care they require.[3] Given the fact that paramedical services are services that "an individual would normally perform for him/herself but for his/her functional limitations," it is appropriate to allow IHSS recipients to train providers on paramedical tasks that they have been trained to perform, but are simply not capable of performing for themselves.

f. Sections 30-757.191 (c)(2)(A) through (c)(2)(F) (Handbook)

The Department states that the specific purpose and factual basis for changes in these sections is merely to provide examples of common tasks which may not be authorized as paramedical services. This is inaccurate. Current regulations do not disallow specific paramedical

---

[2] In addition, in Section 30-756.43 refers to ostomy care as meeting an individual's need for bowel bladder and menstrual care. Ostomy care does not include menstrual care.

[3] One of our Rancho clients was a first grader on a ventilator who would troubleshoot ventilator problems with his LVN, would advise when the ventilator tubing needed to be emptied of fluid and when suctioning needed.

services. Moreover, in practice, the Handbook will be used by Counties as if it has regulatory effect, and the statement to that the Handbook will have no regulatory effect will be meaningless to consumers.

The list of tasks set forth in 30-757.191(2)(A-F) that cannot be authorized are all vital for persons with severe disabilities, and cannot be prohibited wholesale. Specifically:

i. (c)(2)(A): Nail clipping cannot be unilaterally prohibited. This section and section 30-757.14 (e)(3) eliminate nail clipping as a paramedical service. However, for people with disabilities who may have sensitive skin, diabetes, etc. this is a necessary service to maintain health. The stated factual basis for this prohibition is that there is a risk of potential injury. This concern flies in the face of the purpose of paramedical services, which is to allow trained professionals to delegate discrete tasks to lay persons and in turn ensure that consumers avoid institutional care.
ii. (c)(2)(B): Active range of motion cannot be unilaterally prohibited. As explained above, we object to the distinction between active and passive range of motion as two separate activities. However, if the Department retains this distinction, we propose the Department clearly state that active range of motion is an authorized service under Repositioning and Rubbing Skin, not Paramedical Services. As currently drafted, it incorrectly appears to be a disallowed service.
iii. (c)(2)(C and D): Vital sign and blood pressure checks cannot be unilaterally prohibited. A treating physician may order glucose blood levels recorded and blood pressure and temperature and blood oxygen saturation levels recorded as part of ensuring a consumer's health is stable. Additionally, the Department has not provided any justification in the Initial Statement of Reasons explaining why vital sign and blood pressure checks are disallowed.
iv. (c)(2)(E): Applied Behavioral Analysis (ABA) services to remediate autism or behavior intervention service seeking to reduce or extinguish or reduce problem behaviors cannot be unilaterally prohibited. To implement the home portion of an ABA program often requires intensive

training – services and training funded by Medi-Cal and private health plans. Moreover, excluding paramedical services needed because of a cognitive or psychiatric disability constitutes discrimination in violation of federal Medicaid requirements. Any proposed regulation package should comport with the state and federal nondiscrimination provisions.

v. (c)(2)(F): Monitoring the time in between the initiation and the conclusion of the provider performing the task cannot be unilaterally prohibited. This would prevent critical tasks such as: monitoring of a person to determine when suctioning may be needed; intervention to address autonomic dysreflexia; determining when there needs to be adjustment to the functioning of a kangaroo pump; or whether the IHSS beneficiary remains properly placed with their head elevated, for instance.

g. Section 30-757.192(a)(1)(A)

This provision – namely that the IHSS consumer "shall be responsible for payment of any fees required by the LHCP" – violates state and federal law. The Department simply cannot require a consumer of IHSS to pay for the establishment of the need for paramedical services.[4] In addition, the Department has failed to provide instructions for consumers regarding how they may enforce their right to have their Medi-Cal health care professional complete the form and/or how to ensure that the health care professional is paid for the work involved in having the form completed.

h. Section 30-757.192 (b)(1)

Section 30-757.192(b)(1) states that an order for paramedical services must be within the Statewide Paramedical Services Time Authorization

---

[4] California Welfare & Institutions Code Section 12101 requires: "No applicant for or recipient of aid under this chapter shall be required to pay any part of the cost of a medical examination to determine blindness or disability as required by the department in connection with his application for or continued receipt of aid under this chapter." Because IHSS is now primarily a Medi-Cal funded program, state and federal Medicaid rules apply.

Guidelines unless the provider gives an explanation for why the time needed exceeds the guidelines. This is procedurally improper because the Department has not released the Statewide Paramedical Services Time Authorization Guidelines as a part of this regulatory package. This means that stakeholders cannot meaningfully comment on the Time Authorization Guidelines.

These guidelines also fail to comport with the statutory language of Welfare and Institutions Code section 12300.1 which states that paramedical services are supportive services that “are ordered by a licensed health care professional who is lawfully authorized to do so…”. An integral part of authorizing the service is assigning the duration of the task for that particular IHSS recipient. The Statewide Paramedical Services Time Authorization Guidelines are impermissibly usurping the role of the licensed health care professional and substituting the judgment of 20 public health nurses who do not know the individual clients’ needs. We propose the Department eliminate the Statewide Paramedical Services Time Authorization Guidelines from the regulations completely.

i. <u>Section 30-757.192 (b)(2)(B)(1)</u>

Requiring the health professional to justify time outside the proposed (and unwritten) Guidelines will effectively bar consumers from the paramedical services they need. Consumers already struggle with getting a treating health care professional to fill out the existing form. A licensed health care professional who treats an IHSS recipient should not have to justify a need for Paramedical Services against a general set of guidelines.

j. <u>Section 30-757.192(c)</u>

The proposal to invalidate an SOC 321 if the county receives it more than 60 days after it is dated is unfairly burdensome to consumers given the time delay many experience between requesting IHSS services and actually connecting with someone from the county. This will also harm consumers transferring between counties. We propose the Department eliminate this requirement entirely or at minimum extend the deadline to six (6) months.

k. <u>Section 30-757.192 (e)(1) and (2)</u>

Section 30-757.192 (e)(1) states the time authorized for paramedical services shall be based on the time it would take an “average person” to perform the task for the recipient. This language is ambiguous as there is no “average person” standard. Each consumer’s needs must be taken into account when determining the time necessary complete to a paramedical service. Further the Department will need to address whether the so-called “average person” standard comports with requirements under the Fair Labor Standards Act.

Section 30-757.192 (e)(2) goes through standards for determining time for task that in practice will be tremendously onerous, as well as improperly default to a generic Guideline (which as noted above has not yet been created or vetted by stakeholders) rather than the treating professional’s assessment (30-757.192(e)(2)(B)(2)(I)).

I. <u>Section 30-757.193</u>

As stated above, while the list of licensed health care professionals must be expanded, this section also fails to acknowledge that while a physician often signs the paramedical order, it is most often other health care professionals (e.g., speech pathologists, occupational and physical therapists, LVNs and RNs) with direct and relevant treatment experience who provide the actual training. The IHSS consumer, or a primary trained caregiver, are also part of the training. Requiring that paramedical services may only be provided by someone directly trained by one of the health care professionals on the proposed limited list will be a bar to services for consumers.

III. Conclusion

While we have provided comments to the proposed regulations, we reiterate that the regulations must be withdrawn in order to allow meaningful stakeholder engagement. These proposed changes conflict with the purpose of the IHSS program, which is to provide a cost-effective social model approach versus the more expensive and bureaucratic medical model approach followed earlier by CMS and in other States. California’s IHSS program provides a model for other jurisdictions for a cost effective social-model attendant care program. The proposed regulatory package threatens to move IHSS backwards toward an outdated medical model program.

Sincerely,

Elizabeth Zirker
Managing Attorney
Disability Rights California

Claire M. Ramsey
Senior Staff Attorney
Justice in Aging

Kim Selfon
Advocate
Bet Tzedek Legal Services