

Chapter 1 Overview of the Law and the System

Background

In Home Supportive Services (IHSS) is an alternative for individuals who might otherwise be placed in a facility when they are unable to care for themselves in their own home. Cal. Welf. & Inst. Code § 12300(a); MPP 30-701.1. IHSS provides basic services to individuals who cannot safely perform the services themselves due to physical or mental incapacity. MPP 30-756.32; 30-761.25. Personal care services, domestic services, and paramedical services are just a few of the types of services available under IHSS.

History and Funding of IHSS Programs

Changes have been made in how IHSS is funded. Most IHSS services were part of the Medi-Cal program with half paid by the federal government and half with State and county funds. However, some services and cases were only State and county funded. The recent changes brought under Medi-Cal most of the services and cases that before were only funded by State and County funds under the original residual IHSS program. Now half of the costs for those services and cases are federally funded. There are now *three* IHSS programs: (1) The original residual Program (very few people remaining under this program); (2) The Independence Plus Waiver; (3) Medi-Cal Personal Care Services Program.

Old State IHSS Program

IHSS provides a set of services to individuals who require assistance in activities of daily living and other services to remain safely in their own homes. These services include domestic services, services related to domestic services (related services), personal care services, paramedical services, and protective supervision. At some time in the distant past, none of these services were provided under Medi-Cal. They were provided under the old state IHSS program through only state and local funds.

Personal Care Services Program

In the early 1990's, the state shifted all of the services that it believed it could into the Medi-Cal program in order to receive federal financial participation for providing these services. The state called this new program the Personal Care Services Program (PCSP). The state could not shift all of the services at that time (or so it thought) because some of the services were: 1) non-medical such as protective supervision, domestic and related services that were not provided ancillary to personal care services, and the restaurant meals allowance; 2) provided

by spouse or parent providers (federal Medicaid rules prohibit payment for personal care services provided by relatives of a Medicaid beneficiary); 3) services in which payment for the services was made directly to the beneficiary, i.e. advance pay (federal Medicaid rules generally allow only medical vendor payments); and 4) provided to individuals with a share of cost (federal Medicaid rules generally require the same share of cost for all Medi-Cal beneficiaries--the IHSS program has a lower share of cost).

Therefore, the state shifted everything to PCSP except the following:

1. All protective supervision services
2. The restaurant meals allowance
3. All services for individuals who need domestic or related services only
4. All services for individuals who have spouse or parent providers
5. All services for individuals who receive payment in advance (advance pay)
6. All services for individuals who have a share of cost for Medi-Cal
7. All individuals who are not eligible for full-scope Medi-Cal

These seven categories continued to be funded under the old state IHSS program, which came to be called the IHSS Residual (IHSS-R) program. Some people could receive services under both PCSP and IHSS-R, for example people who received protective supervision but did not have a spouse or parent provider. These individuals received protective supervision under the IHSS-R program but received all other services under PCSP. These are called "split cases." By contrast, an individual who had a spouse or parent provider and received protective supervision would receive all services under the IHSS-R program.

Shortly after the PCSP program began, the state shifted individuals with a share of cost into the PCSP program by paying the difference between the Medi-Cal and the IHSS share of cost. This is called buy-in. Of course, an individual who did not qualify for PCSP for some other reason, e.g., the individual had a spouse or parent provider, remained in the IHSS-R program.

In 2004, the state was able to shift funding for everyone else who has full scope Medi-Cal from the IHSS-R program to the Medi-Cal program. It did this by shifting protective supervision and non-ancillary domestic and related services into the PCSP program. The other services that ordinarily cannot be funded under Medicaid because of relative provider and medical vendor payment rules were shifted into a new Medicaid waiver called the Independence Plus Waiver (IPW).

Independence Plus Waiver Program

Before, there were certain IHSS cases that could not be covered by Medi-Cal because of federal Medicaid rules. Those were cases where the provider was the parent of a child under age 18 or the spouse, where there was advance pay, or where someone got a meal allowance instead of time authorized for meal preparation and food shopping. These cases are now covered by Medi-Cal under the IPW.

All of the rules that apply to the original IHSS-R program also apply under the IPW. However, some program rules changed because of the switch to Medi-Cal:

- (1) Some who paid a share of cost for IHSS no longer do so: Persons who qualify for Medi-Cal with no share of cost under the A&D FPL Program; children who qualify for Medi-Cal with no share of cost because the income of a stepparent is not counted under Medi-Cal as it was under the original IHSS-R program; persons who qualify for Medi-Cal without a share of cost under the Pickle program for persons who used to receive SSI but are not eligible now because their Social Security disability or retirement income went up faster than the SSI grant.
- (2) Children and spouses who qualify for Medi-Cal through institutional deeming under a home and community based waiver (like the waiver administered by regional centers) also can qualify for IHSS services provided by a parent or spouse, including protective supervision services where authorized.

In addition, the provider income received by the spouse or parent will not count under any Medi-Cal program. The parent's provider income remains Medi-Cal exempt until the child reaches age 21. However, there are no longer split cases because of requirements under the IPW. That means that no more than 195 hours a month total can be authorized for a non-severely impaired IHSS recipient who receives services from both a spouse and someone else or from both the parent of a minor and someone else. DHS ACWDLs 05-21, 05-26, 05-29, 06-04, 06-19; DSS ACLs 05-05, 05-05E; DSS ACIN 1-28-06.

The IPW program is a Social Security Act section 1115 demonstration program. The type of waiver is an "Independence Plus" waiver. This is a type of waiver that CMS has come up with recently to assist in implementing the Olmstead decision. The Section 1115 waiver category is a broad category that allows for waiver of program requirements in a number of Social Security Act programs, including

Medicaid. This is somewhat different from the Social Security Act section 1915 waivers, which allow for waiver of freedom of choice requirements (i.e. managed care waivers), or provide for Home and Community Based Services (HCBS). Statutory authority for Section 1115 waivers is very broad, but CMS has developed a number of administrative limitations on waiver authority, such as the requirement that a Medicaid beneficiary can be in only one Section 1115 waiver. This is why individuals cannot be in both the IPW and the Senior Care Action Network (SCAN) waiver, but can be in the IPW and an HCBS waiver. (See ACIN No. 1-28-06, Question 1.)

All IHSS services for individuals with spouse and parent providers will be provided under the IPW. (See ACIN No. 1-28-06, Question 4.) This includes protective supervision, which can still be provided by parent providers just as under the old system. (See ACIN No. 1-28-06, Question 9.) However, all services, including protective supervision, will now be funded under Medi-Cal through the IPW, rather than under the IHSS-R program. All of the old restrictions on spouse and parent providers apply, such as restrictions on working outside of the home. (See ACIN No. 1-28-06, Question 6, 8.) All of the non-restrictions also apply. (See ACIN No. 1-28-06, Question 12, 13.)

A person who is eligible for the IPW will no longer be eligible to receive services under the IHSS-R program to the extent those services are available under the IPW program. A person will not be eligible to receive services under the IPW to the extent those services are available under the PCSP program.

IHSS Residual Program

Individuals who are not eligible for full scope Medi-Cal (and therefore cannot receive services under PCSP or IPW) continue to receive services under the IHSS-R program. (See ACIN No. 1-28-06, Question 1.) They can receive limited-scope Medi-Cal. (Id.)

Recipients who remain in the IHSS-R program are those who have been determined eligible for IHSS-R services, but who are not eligible for federally funded full-scope Medi-Cal, such as non-citizens under the five year ban. Recipients in the IHSS-R program are eligible for Medi-Cal only if they have had a Medi-Cal eligibility determination by a Medi-Cal eligibility worker and meet Medi-Cal eligibility criteria for coverage under one of the Medi-Cal programs appropriate for their status.

IHSS-R, IPW, and PCSP Programs

IHSS-R, IPW and PCSP operate as a single program. The Medi-Cal statutes that cover IPW and Medi-Cal personal care services says that original IHSS residual program rules are to be followed when authorizing services. (Welf. & Inst. Code § 14132.951(e); Welf. & Inst. Code § 14132.95(i). When people say “IHSS” they usually are referring to all three programs. Most people’s services are covered by the Medi-Cal PCSP where the federal government pays for half the cost of services under regular Medicaid program rules– just as the federal government pays for half the cost of other Medi-Cal services. If the services are being provided by the spouse or the parent of a minor, or if there is advance pay or restaurant meal allowances, *and* the recipient is an unrestricted Medi-Cal beneficiary, then the services are covered under the IPW because of federal Medicaid rules. Persons not eligible for unrestricted Medi-Cal must receive their IHSS services under the IHSS-R Program. Protective supervision used to be covered only under the former IHSS residual program but is now available under all three programs.

Recent Changes

The changes in IHSS funding have resulted in some positive and some negative changes in eligibility for IHSS services, and calculation of maximum hours. These changes are described below.

Protective Supervision Services and Cases Where Only Domestic and Related Services are Authorized are Now Covered Under Medi-Cal.

Before, cases where only domestic and related services were authorized were covered under the original residual IHSS program. Hours authorized for protective supervision also were only covered under the original residual IHSS program. During the approval process of the IPW program, California also sought and obtained federal approval to amendments in its State Plan to include protective supervision and cases where only domestic and related services are authorized. Now, funding for these cases is available under PCSP in addition to the IPW and IHSS-R programs. The change is retroactive to May of 2004.

Home and Community Based Services (HCBS) Waivers Now Provide Access to All IHSS Services

The Developmental Disabilities (DD) HCBS waiver, as well as other HCBS waivers provide for something called institutional deeming. Although this may seem counterintuitive, institutional deeming is a good thing. This is because institutional deeming provides that income of a spouse or parent of a child under age 18 will not be deemed to a Medi-Cal beneficiary who is in an institution. Community deeming provides that income of a spouse or parent of a child under

age 18 will be deemed to a Medi-Cal beneficiary who is living in the same household as the spouse or parent. Community deeming often made it impossible for an individual to live at home because the deemed income of the spouse or parent often made the individual ineligible for Medi-Cal. The individual would qualify for Medi-Cal only if placed in an institution.

Under the old IHSS system, if someone received Medi-Cal under an HCBS waiver, such as the DD waiver, and they also received PCSP, they would receive all of the Medi-Cal benefits, including PCSP, with zero share of cost. However, if the individual needed protective supervision, there would be a share of cost for protective supervision. This is because protective supervision was only available under the IHSS-R program and there was no institutional deeming under that program. Community deeming was always applied.

Under the new system, all people with full-scope Medi-Cal will receive services under the Medi-Cal program. This means that institutional deeming will apply across the board. This is true both for people who receive their services under PCSP and under IPW. (See ACIN No. 1-28-06, Question 10.) Community deeming will continue to be applied to people who continue to receive services under the IHSS-R program.

Parent and Spouse Providers of HCBS Waiver Recipients Now Permitted

Before, if someone qualified for Medi-Cal under one of the Nursing Facility Waivers or under the Waiver for Persons with Developmental Disabilities, that person would not qualify for services provided by a spouse or, if a minor, a parent. Now that individual may receive IHSS services with a parent or spouse provider under the IPW.

Advance Pay/ HCBS Nursing Facility Waiver Cases Grandfathered

HCBS waiver budgets of enrollees who used to receive residual IHSS will not be reduced by the IPW Program. The California Department of Health Services (DHS) authorized “Grandfather” protection for persons who were enrolled on December 1, 2004, in one of the Home and Community Based Services (HCBS) waivers administered by the DHS’ In-Home Operations (IHO) and who were also receiving In-Home Supportive Services (IHSS). Waiver enrollees are subject to an individual cost-effective cap that counts all Medi-Cal services including HCBS waiver Medi-Cal services. Not counted against the individual cost effectiveness budget were IHSS services not covered under Medi-Cal: advance pay, parent or spouse provider services, and protective supervision. Under the IPW and clarification of services coverable under Medi-Cal outside the demonstration

waiver, all of these services are now covered under Medi-Cal. So that HCBS waiver enrollees would not have their IHSS services count against their individual budgets thereby reducing what could be covered as waiver services, DHS agreed to “grandfather” or freeze HCBS enrollees’ budgets.

No More Share of Cost for Some Medi-Cal Beneficiaries

In the past, if someone had income too high to qualify for SSI but could qualify for Medi-Cal with no share of cost under the Aged & Disabled Federal Poverty Level (A & D FPL) Program or as a “Pickle”, that person probably would have had a share of cost if he or she elected to receive advance pay. Now that individual may receive IHSS services with advance pay without a share of cost under the IPW.

Interplay of Protective Supervision between IHSS Programs

The Medi-Cal program distinguishes between severely and non-severely impaired when authorizing protective supervision hours¹. If you are non-severely impaired, you cannot be authorized more than 195 protective supervision hours in a month. The total maximum amount of hours you can receive for all services is 283 hours in a month whether you are severely or non-severely impaired. If you are non-severely impaired and receiving services under PCSP, you will be authorized 195 hours for protective supervision plus the other hours authorized or the difference between your other hours authorized and 283, whichever is less.

Example: The county determines you need protective supervision. The county authorizes 70 hours for services other than protective supervision and determines that you are non-severely impaired. You would be authorized a total of 265 hours – 70 hours plus 195 protective supervision hours. If you instead had been authorized 100 hours for services other than protective supervision, then the total hours you would be authorized is 283 because that is the maximum number of hours that can be authorized in a month.

If you are non-severely impaired and receiving services either under the IPW or IHSS-R programs, you will be authorized up to 195 hours maximum, regardless of your protective supervision and additional personal care services needs. In this situation, it may be worth the effort trying to establish severely impaired status through the self-assessment process covered in Chapter 4 to obtain more hours if you are being served under the IPW or IHSS-R programs. Otherwise, if you are an

¹ To figure out if you are a “severely impaired” or a “non-severely impaired” recipient, please refer to the section entitled “Monthly Hours-Severely vs. Non-Severely Impaired” in Chapter 2 explaining how those categories are determined under IHSS law.

IPW recipient, you may want to consider changing the conditions in which you receive services in order to gain eligibility under PCSP to obtain additional hours. The ways in which to do so are discussed below.

Hourly Cap under PCSP for Protective Supervision Only Cases

The change provides that for non-severely-impaired individuals, protective supervision hours are limited to 195 hours, while non-protective supervision hours may be provided in addition up to a combined maximum of 283. (See ACIN No. 1-28-06, Question 15.) This seems to be designed to treat former split case beneficiaries who are non-severely impaired and now receive all services including protective supervision under the PCSP program the same way they were under the Residual program. However, there is no authority in the law for limiting protective supervision hours to 195 hours because there is no such limitation under the PCSP program.

Welfare and Institutions Code section 14132.95(g), which governs the PCSP program, provides: "The maximum number of hours available under the In-Home Supportive Services program pursuant to Article 7 (commencing with Section 12300) of Chapter 3, Section 14132.951, and this section, combined, shall be 283 hours per month."

Since protective supervision is provided based on a 24-hour need for the services it must be provided up to the maximum available hours. This is 283 for the PCSP program.

Elimination of Split Cases

There are no more "split cases," i.e., non-severely disabled people who receive services under both the Residual and PCSP programs. People will receive all services under either PCSP, IPW, or the IHSS-R program. Full-scope Medi-Cal beneficiaries who have spouse or parent providers, receive advance pay, or receive the restaurant meals allowance will receive all services under the IPW. All other full-scope Medi-Cal beneficiaries will receive all services under the PCSP program. All limited-scope Medi-Cal beneficiaries, and beneficiaries who are not eligible for Medi-Cal, will receive all services under the IHSS-R program.

This is bad because it may result in a reduction in the maximum hours that some individuals can receive. Under the IHSS-R program there is a limitation of 283 hours per month for individuals who are "severely impaired," i.e. who need 20 hours or more per week of personal care services and/or meal preparation, and 195 hours per month for individuals who are "non-severely impaired," i.e., who need

less than 20 hours per week of those services. Under the PCSP program, there is no distinction between individuals who are severely or non-severely impaired. The 283 hour limit applies to both groups. Protective supervision hours under the Residual program were limited to 195 hours per month, but additional non-protective supervision hours could be provided under the PCSP program for a combined total hours up to 283 per month.

Therefore, a non-severely impaired individual who had both a spouse or parent provider and a non-spouse or parent provider would receive services from the spouse/parent provider under the Residual program and from the non-spouse/parent provider under the PCSP program. Also an individual who did not have a spouse or parent provider, and who needed protective supervision, would receive protective supervision under the Residual program and other IHSS services under the PCSP program. In both cases, the non-severely impaired individual could receive IHSS-R program benefits up to a maximum of 195 and additional PCSP program benefits up to a combined maximum of 283.

This does not make a difference for "split cases" transferred to the PCSP; the 283 maximum under PCSP continues to apply. This also does not make a difference for individuals who have only a spouse or parent provider. Those individuals were limited to 195 hours under the IHSS-R program if non-severely impaired. The same rules apply under IPW. However, this does make a difference for "split cases" transferred to the IPW, namely individuals who have both a parent/spouse and non-parent/spouse provider. (See ACIN No. 1-28-06, Question 5, 15.) These individuals will have their maximum hours reduced to 195.

How to Deal with the Split Cases Elimination

The limitation on split cases is not an issue for advance pay beneficiaries. An individual must be severely impaired in order to receive advance pay. Therefore, maximum hours were 283 for severely-impaired beneficiaries under the IHSS-R program and continue to be 283 for severely-impaired beneficiaries under the IPW.

The limitation on split cases may be an issue for individuals who receive the restaurant meals allowance. Individuals with the restaurant meals allowance who receive the maximum grant of 195 hours (if there is anyone in that category) may want to give up the restaurant meals allowance and receive hours for meals so that they can be transferred to the PCSP program. They may also want to consider disconnecting their stove so that they can qualify for the restaurant meals allowance under the SSI program if they want to continue to have restaurant meals rather than meal services under IHSS.

It also may be possible to qualify an IPW beneficiary for PCSP by having a non-spouse/parent provider only.

It may be possible to increase the maximum hours by qualifying someone as severely impaired. Therefore, look carefully at the hours assessed for personal care and meal preparation. Very often counties assess this at 19.5, or some other figure close to 20, for the purpose of denying the severely-impaired maximum hours. If these hours are increased to 20 per week, the individual qualifies for 283 hours per month under the PCSP, IPW or IHSS-R programs.

If you are faced with a reduction due to the program change, please contact DISABILITY RIGHTS CALIFORNIA or OCRA. Here are some questions that will give us the information that we need to evaluate these cases:

1. Did you get a notice of action?
2. What is the date of the notice?
3. When did you get the notice?
4. Is there a reduction in your hours?
5. What are the old hours and what are the new hours?
6. Does the notice say you need hours for personal care and meal preparation? How many hours?
7. Do you have a spouse or parent provider?
8. Do you receive protective supervision?
9. Do you receive Medi-Cal?
10. Do you receive a restaurant meals allowance from IHSS? (It will say on the notice.)