

Consumer Directed Personal Assistance Program (CDPAP)

Effective date: 4/20/11

Summary of Express Terms

The Consumer Directed Personal Assistance Program (CDPAP) regulations provide local social services districts, CDPAP fiscal intermediaries, consumers, and other long term care stakeholders with a single, standardized operational framework supportive of the program's unique design and philosophy.

The regulations include a description of the program as defined in Social Services Law section 365-f, followed by definitions of terms referenced throughout the regulations.

The regulations also contain the CDPAP eligibility requirements and the assessment/reassessment process used by local social services districts to determine an applicant's eligibility and appropriateness for participation in the program.

As a Medicaid funded home care program administered and prior authorized by the local social services districts, the regulations also include prior authorization and client notification protocols.

As a consumer directed model of home care, the regulations describe the role and responsibilities of program participants and of the fiscal intermediary that acts as the employer of record on behalf of the consumer.

The payment portion of the regulations identifies the Department of Health as being responsible for establishing CDPAP rates. The regulations also identify that a local social services district, with Department of Health approval, may establish an alternative payment methodology for determining a county's CDPAP rates.

The regulations promote state-wide program uniformity and comparability of benefits by providing stakeholders with a clear understanding of their respective roles and responsibilities, the purpose of the program, and procedures to be used in determining program eligibility.

Pursuant to the authority vested in the Commissioner of Health by paragraph (b) of subdivision (5) of section 365-f of the Social Services Law, a new section 28 is added to Part 505 of Title 18 (Social Services) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), to read as follows:

Part 505 is amended to add a new section 28, to read as follows:

505.28 Consumer directed personal assistance program.

(a) Purpose. The consumer directed personal assistance program is intended to permit chronically ill or physically disabled individuals receiving home care services under the medical assistance program greater flexibility and freedom of choice in obtaining such services.

(b) Definitions. The following definitions apply to this section:

(1) “consumer” means a medical assistance recipient who a social services district has determined eligible to participate in the consumer directed personal assistance program.

(2) “consumer directed personal assistance” means the provision of some or total assistance with personal care services, home health aide services and skilled nursing tasks by a consumer directed personal assistant under the instruction, supervision and direction of a consumer or the consumer’s designated representative.

(3) “consumer directed personal assistant” means an adult who provides consumer directed personal assistance to a consumer under the consumer’s instruction, supervision and direction or under the instruction, supervision and direction of the consumer’s

designated representative. A consumer's spouse, parent or designated representative may not be the consumer directed personal assistant for that consumer; however, a consumer directed personal assistant may include any other adult relative of the consumer who does not reside with the consumer or any other adult relative who resides with the consumer because the amount of care the consumer requires makes such relative's presence necessary.

(4) "continuous 24-hour consumer directed personal assistance" means the provision of uninterrupted care, by more than one consumer directed personal assistant, for a consumer who, because of the consumer's medical condition or disabilities, requires total assistance with toileting, walking, transferring or feeding at unscheduled times during the day and night.

(5) "designated representative" means an adult to whom a self-directing consumer has delegated authority to instruct, supervise and direct the consumer directed personal assistant and to perform the consumer's responsibilities specified in subdivision (g) of this section and who is willing and able to perform these responsibilities. With respect to a non self-directing consumer, a "designated representative" means the consumer's parent, legal guardian or, subject to the social services district's approval, a responsible adult surrogate who is willing and able to perform such responsibilities on the consumer's behalf. The designated representative may not be the consumer directed personal assistant or a fiscal intermediary employee, representative or affiliated person.

(6) "fiscal intermediary" means an entity that has a contract with a social services district to provide wage and benefit processing for consumer directed personal assistants and other fiscal intermediary responsibilities specified in subdivision (i) of this section.

(7) “home health aide services” means services within the scope of practice of a home health aide pursuant to Article 36 of the Public Health Law including simple health care tasks, personal hygiene services, housekeeping tasks essential to the consumer’s health and other related supportive services. Such services may include, but are not necessarily limited to, the following: preparation of meals in accordance with modified diets or complex modified diets; administration of medications; provision of special skin care; use of medical equipment, supplies and devices; change of dressing to stable surface wounds; performance of simple measurements and tests to routinely monitor the consumer’s medical condition; performance of a maintenance exercise program; and care of an ostomy after the ostomy has achieved its normal function.

(8) “personal care services” means the nutritional and environmental support functions, personal care functions, or both such functions, that are specified in Section 505.14(a)(6) of this Part.

(9) a “self-directing consumer” means a consumer who is capable of making choices regarding the consumer’s activities of daily living and the type, quality and management of his or her consumer directed personal assistance; understands the impact of these choices; and assumes responsibility for the results of these choices.

(10) “skilled nursing tasks” means those skilled nursing tasks that are within the scope of practice of a registered professional nurse or a licensed practical nurse and that a consumer directed personal assistant may perform pursuant to Section 6908 of the Education Law.

(11) “some assistance” means that a specific personal care service, home health aide service or skilled nursing task is performed or completed by the consumer with help from another individual.

(12) “stable medical condition” means a condition that is not expected to exhibit sudden deterioration or improvement and does not require frequent medical or nursing evaluation or judgment to determine changes in the consumer’s plan of care.

(13) “total assistance” means that a specific personal care service, home health aide service or skilled nursing task is performed or completed for the consumer.

(c) Eligibility requirements. To participate in the consumer directed personal assistance program, an individual must meet the following eligibility requirements:

(1) be eligible for medical assistance;

(2) be eligible for long term care and services provided by a certified home health agency, long term home health care program or an AIDS home care program authorized pursuant to Article 36 of the Public Health Law; or for personal care services or private duty nursing services;

(3) have a stable medical condition;

(4) be self-directing or, if non self-directing, have a designated representative;

(5) need some or total assistance with one or more personal care services, home health aide services or skilled nursing tasks;

(6) be willing and able to fulfill the consumer’s responsibilities specified in subdivision (g) of this section or have a designated representative who is willing and able to fulfill such responsibilities; and

(7) participate as needed, or have a designated representative who so participates, in the required assessment and reassessment processes specified in subdivisions (d) and (f) of this section.

(d) Assessment process. When the social services district receives a request to participate in the consumer directed personal assistance program, the social service district must assess whether the individual is eligible for the program. The assessment process includes a physician's order, a social assessment and a nursing assessment and, when required under paragraph (5) of this subdivision, a referral to the local professional director or designee.

(1) Physician's order. (i) A physician licensed in accordance with article 131 of the Education Law, a physician assistant or a specialist assistant registered in accordance with article 131-B of the Education Law or a nurse practitioner certified in accordance with article 139 of the Education Law must conduct a medical examination of the individual and complete the physician's order within 30 calendar days after conducting the medical examination.

(ii) The physician's order must be completed on a form that the department requires or approves. The physician or other medical professional who conducted the examination must complete the order form by accurately describing the individual's medical condition and regimens, including any medication regimens; the individual's need for assistance with personal care services, home health aide services and skilled nursing tasks; and provide only such other information as the physician's order form requires. The physician or other medical professional who completes the order form

must not recommend the number of hours of services that the individual should be authorized to receive.

(iii) A physician must sign the physician's order form and certify that the individual can be safely cared for at home and that the information provided in the physician's order form accurately describes the individual's medical condition and regimens, including any medication regimens, and the individual's need for assistance at the time of the medical examination.

(iv) The physician's order form must be submitted to the social services district within 30 calendar days after the medical examination. The form may be submitted by the physician, other medical professional or by the individual or the individual's representative.

(v) The physician's order form is subject to the provisions of Parts 515, 516, 517 and 518 of this article, which permit the department to impose monetary penalties on, or sanction and recover overpayments from, providers and prescribers of medical care, services or supplies when medical care, services or supplies that are unnecessary, improper or exceed recipients' documented needs are provided or ordered.

(2) Social assessment. Upon receipt of a completed and signed physician's order, social services district professional staff must conduct a social assessment. The social assessment must include the following:

(i) a discussion with the individual or, if applicable, the individual's designated representative to determine the individual's perception of his or her circumstances and preferences;

(ii) an evaluation of the individual's ability and willingness to fulfill the consumer's responsibilities specified in subdivision (g) of this section and, if applicable, the ability and willingness of the individual's designated representative to assume these responsibilities; and

(iii) an evaluation of the potential contribution of informal supports, such as family members or friends, to the individual's care, which must consider the number and kind of informal supports available to the individual; the ability and motivation of informal supports to assist in care; the extent of informal supports' potential involvement; the availability of informal supports for future assistance; and the acceptability to the individual of the informal supports' involvement in his or her care.

(3) Nursing assessment. Upon receipt of a completed and signed physician's order, the social services district must conduct or obtain a nursing assessment.

(i) The nursing assessment must be completed by a registered professional nurse who is employed by the social services district or by a licensed or certified home care services agency under contract with the district. The nurse must have a license and current registration to practice as a registered professional nurse in New York State and at least two years of satisfactory recent experience in home health care.

(ii) The nursing assessment must include the following:

(a) a review and interpretation of the physician's order;

(b) the primary diagnosis code from the ICD-9-CM;

(c) an evaluation whether the individual's medical condition, as described in the physician's order, would require frequent nursing evaluation or judgment;

(d) an evaluation of the personal care services, home health aide services and skilled nursing tasks that the individual requires and whether the individual requires some assistance or total assistance with such services or tasks;

(e) an evaluation, made in conjunction with the social assessment and physician's order, whether the individual or, if applicable, the individual's designated representative, is self-directing and willing and able to instruct, supervise and direct the consumer directed personal assistant in performing any needed skilled nursing tasks, home health aide services and personal care services;

(f) an evaluation whether the individual's need for assistance can be totally or partially met through the use of specialized medical equipment or supplies including, but not limited to, commodes, urinals, adult diapers, walkers or wheelchairs and whether the individual would be appropriate for personal emergency response services provided in accordance with section 505.33 of this part;

(g) development of a plan of care in collaboration with the individual or, if applicable, the individual's designated representative, that identifies the personal care services, home health aide services and skilled nursing tasks with which the individual needs assistance in the home, the degree of assistance required and a recommendation for the number of hours or frequency of such assistance; and

(h) recommendations for authorization of services.

(4) Guidelines for completion of social and nursing assessment. The social services district must conduct the social assessment and conduct or obtain a nursing assessment with reasonable promptness, generally not to exceed 30 calendar days after receiving a completed and signed physician's order, except in unusual circumstances

including, but not limited to, when the individual or, if applicable, the individual's designated representative has failed to participate as needed in the assessment process.

(5) Local professional director review. If there is a disagreement among the physician's order, nursing and social assessments, or a question regarding the level, amount or duration of services to be authorized, or if the case involves continuous 24-hour consumer directed personal assistance, an independent medical review of the case must be completed by the local professional director, a physician designated by the local professional director or a physician under contract with the social services district. The local professional director or designee must review the physician's order and the nursing and social assessments and is responsible for the final determination regarding the level and amount of services to be authorized. The final determination must be made with reasonable promptness, generally not to exceed five business days after receipt of the physician's order and the completed social and nursing assessments, except in unusual circumstances including, but not limited to, the need to resolve any outstanding questions regarding the level, amount or duration of services to be authorized.

(e) Authorization process. (1) When the social services district determines pursuant to the assessment process that the individual is eligible to participate in the consumer directed personal assistance program, the district must authorize consumer directed personal assistance according to the consumer's plan of care. The district must not authorize consumer directed personal assistance unless it reasonably expects that such assistance can maintain the individual's health and safety in the home or other setting in which consumer directed personal assistance may be provided.

(2) The district may authorize only the hours or frequency of services that the consumer actually requires to maintain his or her health and safety in the home. The authorization must be completed prior to the initiation of services.

(3) The duration of the authorization period must be based upon the consumer's needs as reflected in the required assessments. In determining the authorization period, the social services district must consider the consumer's prognosis and potential for recovery and the expected duration and availability of any informal supports identified in the plan of care.

(4) No authorization may exceed six months unless the social services district has requested, and the department has approved, authorization periods of up to twelve months. The department may approve district requests for authorization periods of up to twelve months provided that professional staff of the social services district or its designee conduct a home visit with the consumer and, if applicable, the consumer's designated representative every six months and evaluate whether:

(i) the plan of care continues to meet the consumer's needs;

(ii) the consumer or, if applicable, the consumer's designated representative continues to be willing and able to perform the consumer's responsibilities specified in subdivision (g) of this section; and

(iii) the fiscal intermediary is fulfilling its responsibilities specified in subdivision (i) of this section.

(5) The social services district must provide the consumer with a copy of the plan of care that specifies the consumer directed personal assistance that the district has

authorized the consumer to receive and the number of hours per day or week of such assistance.

(6) Nothing in this subdivision precludes the provision of the consumer directed personal assistance program in combination with other services when a combination of services can appropriately and adequately meet the consumer's needs; provided, however, that no duplication of Medicaid-funded services would result.

(f) Reassessment and reauthorization processes. (1) Prior to the end of the authorization period, the social services district must reassess the consumer's continued eligibility for the consumer directed personal assistance program in accordance with the assessment process set forth in subdivision (d) of this section.

(i) The reassessment must evaluate whether the consumer or, if applicable, the consumer's designated representative satisfactorily fulfilled the consumer's responsibilities under the consumer directed personal assistance program. The social services district must consider whether the consumer or, if applicable, the consumer's designated representative has failed to satisfactorily fulfill the consumer's responsibilities when determining whether the consumer should be reauthorized for the consumer directed personal assistance program.

(ii) When the social services district determines, pursuant to the reassessment process, that the consumer is eligible to continue to participate in the consumer directed personal assistance program, the district must reauthorize consumer directed personal assistance in accordance with the authorization process specified in subdivision (e) of this section. When the district determines that the consumer is no longer eligible to continue to participate in the consumer directed personal assistance program, the district must send

the consumer, and such consumer's designated representative, if any, a timely and adequate notice under Part 358 of this chapter of the district's intent to discontinue consumer directed personal assistance on forms required by the department.

(2) The social services district must reassess the consumer when an unexpected change in the consumer's social circumstances, mental status or medical condition occurs during the authorization or reauthorization period that would affect the type, amount or frequency of consumer directed personal assistance provided during such period. The district is responsible for making necessary changes in the authorization or reauthorization on a timely basis in accordance with the following procedures:

(i) When the change in the consumer's service needs results solely from an unexpected change in the consumer's social circumstances including, but not limited to, loss or withdrawal of informal supports or a designated representative, the social services district must review the social assessment, document the consumer's changed social circumstances and make changes in the authorization or reauthorization as needed. A new physician's order and nursing assessment are not required; or

(ii) When the change in the consumer's service needs results from a change in the consumer's medical condition, including loss of the consumer's ability to instruct, supervise or direct the consumer directed personal assistant, the social services district must obtain a new physician's order, social assessment and nursing assessment.

(g) Consumer responsibilities. A consumer or, if applicable, the consumer's designated representative has the following responsibilities under the consumer directed personal assistance program:

(1) managing the plan of care including recruiting and hiring a sufficient number of individuals who meet the definition of consumer directed personal assistant, as set forth in subdivision (b) of this section, to provide authorized services that are included on the consumer's plan of care; training, supervising and scheduling each assistant; terminating the assistant's employment; and assuring that each consumer directed personal assistant competently and safely performs the personal care services, home health aide services and skilled nursing tasks that are included on the consumer's plan of care;

(2) timely notifying the social services district of any changes in the consumer's medical condition or social circumstances including, but not limited to, any hospitalization of the consumer or change in the consumer's address, telephone number or employment;

(3) timely notifying the fiscal intermediary of any changes in the employment status of each consumer directed personal assistant;

(4) attesting to the accuracy of each consumer directed personal assistant's time sheets;

(5) transmitting the consumer directed personal assistant's time sheets to the fiscal intermediary according to its procedures;

(6) timely distributing each consumer directed personal assistant's paycheck, if needed;

(7) arranging and scheduling substitute coverage when a consumer directed personal assistant is temporarily unavailable for any reason; and

(8) entering into a department approved memorandum of understanding with the fiscal intermediary and with the social services district that describes the parties' responsibilities under the consumer directed personal assistance program.

(h) Social services district responsibilities. Social services districts have the following responsibilities with respect to the consumer directed personal assistance program:

(1) annually notifying recipients of personal care services, long term home health care program services, AIDS home care program services or private duty nursing services of the availability of the consumer directed personal assistance program and affording them the opportunity to apply for the program;

(2) complying with the assessment, authorization, reassessment and reauthorization procedures specified in subdivisions (d) through (f) of this section;

(3) receiving and promptly reviewing, the fiscal intermediary's notification to the district pursuant to subparagraph (i)(1)(v) of this section of any circumstances that may affect the consumer's or, if applicable, the consumer's designated representative's ability to fulfill the consumer's responsibilities under the program and making changes in the consumer's authorization or reauthorization as needed;

(4) discontinuing, after timely and adequate notice in accordance with part 358 of this chapter, the consumer's participation in the consumer directed personal assistance program and making referrals to other services that the consumer may require when the district determines that the consumer or, if applicable, the consumer's designated representative is no longer able to fulfill the consumer's responsibilities under the program or no longer desires to continue in the program;

(5) notifying consumers, on forms required by the department, of the district's decision to authorize, reauthorize, increase, reduce, discontinue or deny services under the consumer directed personal assistance program, and of the consumer's right to request a fair hearing pursuant to part 358 of this chapter;

(6) maintaining current case records on each consumer and making such records available, upon request, to the department or the department's designee;

(7) entering into contracts with each fiscal intermediary for the provision of fiscal intermediary responsibilities specified in subdivision (i) of this section and monitoring the fiscal intermediary's performance under the contract, including reviewing the fiscal intermediary's administrative and personnel policies and recordkeeping relating to the provision of consumer directed personal assistance program services and evaluating the quality of services that the fiscal intermediary provides; and

(8) entering into a department approved memorandum of understanding with the consumer that describes the parties' responsibilities under the consumer directed personal assistance program.

(i) Fiscal intermediary responsibilities. (1) Fiscal intermediaries have the following responsibilities with respect to the consumer directed personal assistance program:

(i) processing each consumer directed personal assistant's wages and benefits including establishing the amount of each assistant's wages; processing all income tax and other required wage withholdings; and complying with worker's compensation, disability and unemployment insurance requirements;

(ii) ensuring that the health status of each consumer directed personal assistant is assessed prior to service delivery pursuant to 10 NYCRR § 766.11(c) and (d) or any successor regulation;

(iii) maintaining personnel records for each consumer directed personal assistant, including time sheets and other documentation needed for wages and benefit processing and a copy of the medical documentation required pursuant to 10 NYCRR § 766.11(c) and (d) or any successor regulation;

(iv) maintaining records for each consumer including copies of the social services district's authorization or reauthorization;

(v) monitoring the consumer's or, if applicable, the consumer's designated representative's continuing ability to fulfill the consumer's responsibilities under the program and promptly notifying the social services district of any circumstance that may affect the consumer's or, if applicable, the consumer's designated representative's ability to fulfill such responsibilities;

(vi) complying with the department's regulations at 18 NYCRR § 504.3, or any successor regulation, that specify the responsibilities of providers enrolled in the medical assistance program;

(vii) entering into a contract with the social services district for the provision of fiscal intermediary services; and

(viii) entering into a department approved memorandum of understanding with the consumer that describes the parties' responsibilities under the consumer directed personal assistance program.

(2) Fiscal intermediaries are not responsible for fulfilling responsibilities of the consumer or, if applicable, the consumer's designated representative. Nothing in this section shall diminish, however, the fiscal intermediary's failure to exercise reasonable care in properly carrying out its responsibilities under the program.

(j) Payment. (1) The department will pay fiscal intermediaries that are enrolled as Medicaid providers and have contracts with social services districts for the provision of consumer directed personal assistance services at rates that the department establishes and that the Director of the Division of the Budget approves, except as provided in paragraph (2) of this subdivision.

(2) A social services district may submit a written request to the department to use an alternative payment methodology. The request must describe the alternative payment methodology that the district will use to determine payments to fiscal intermediaries for consumer directed personal assistance services and include such other information as the department may require. The department may grant a district's exemption request when it determines that the alternative payment methodology is based on the fiscal intermediary's allowable costs of providing consumer directed personal assistance services and includes an adjustment for inflationary increases in the fiscal intermediary's costs of doing business.

(3) No payment to the fiscal intermediary will be made for authorized services unless the fiscal intermediary's claim is supported by documentation of the time spent in provision of services for each consumer.

Regulatory Impact Statement Summary

The Regulatory Impact Statement (RIS) identifies the statutory authority which allows the Department of Health to propose Consumer Directed Personal Assistance Program (CDPAP) regulations and describes the legislature's objectives in directing the Department to establish a CDPAP.

The Needs and Benefits portion of the RIS identify that the CDPAP is administered by local social services districts and that regulations are needed to establish a uniformly administered program with comparable state wide benefits. Standardized application, assessment and authorization protocols will ensure that Medicaid beneficiaries have access to appropriate benefits and that local social services districts, CDPAP fiscal intermediaries, and consumer's roles and responsibilities are governed by a single set of standards.

As an existing Medicaid entitlement, no new costs associated with establishment of the regulations to regulated parties, or to local government are anticipated. The State share of program expenses may be increased as the regulations would expand the types of family members who may provide care and be reimbursed under the CDPAP benefit. The CDPAP was previously operating under the Personal Care Services regulations which bar a consumer's spouse, parent, son, son-in-law, daughter or daughter-in-law from providing Medicaid funded services to the consumer. The proposed CDPAP regulations would no longer bar the consumer's son, son-in-law, daughter, or daughter-in-law from serving as the consumer's assistant. As the Department has no data

quantifying the extent to which adult children or children-in-law of Medicaid beneficiaries provide informal non-Medicaid funded care currently, the number of unpaid caregivers converting to Medicaid funded care is unknown.

Although the regulations impose a mandate on local social services districts, local social services districts have been administering the program for nearly two decades and the regulations do not impose any new requirements.

The proposed regulations do not impose any new forms, reporting or other paperwork requirements and do not duplicate or overlap any existing State or federal requirements. Additionally, the proposed regulations do not exceed any minimum federal standards.

As the proposed regulations seek to standardize the administrative and operational environment of the CDPAP and to provide all stakeholders with clearly defined roles and responsibilities of affected parties, social services districts and fiscal intermediaries should be able to comply with the proposed regulations when they become effective.

Contact Person: Katherine Ceroalo
New York State Department of Health
Bureau of House Counsel, Regulatory Affairs Unit
Corning Tower Building, Rm. 2438
Empire State Plaza
Albany, New York 12237
(518) 473-7488
(518) 473- 2019 (FAX)
REGSQNA@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

Social Services Law (“SSL”) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State’s medical assistance (“Medicaid”) program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State’s Medicaid program.

The State’s Medicaid program includes the consumer directed personal assistance program authorized by SSL section 365-f. All social services districts must assure access to a consumer directed personal assistance program operated pursuant to this statute. SSL section 367-p(c).

Pursuant to SSL section 365-f(5)(b), the Department may promulgate regulations necessary to carry out the program’s objectives, which are to permit chronically ill or physically disabled individuals greater flexibility and choice in obtaining home care services. SSL section 365-f(1). The regulations must describe the responsibilities of eligible individuals in arranging and paying for services and the protections assured such individuals if they are unable or no longer desire to continue in the program. SSL section 365-f(5)(b).

The Legislature has exempted the consumer directed personal assistance program authorized pursuant to SSL § 365-f from the requirements of the Nurse Practice Act. As a result, persons whom Medicaid recipients hire and train as their consumer directed personal assistance aides but who are not licensed as nurses may nonetheless lawfully perform needed skilled nursing tasks that recipients require. Education Law section 6908(1)(a)(iii).

The proposed regulations are within the Department's statutory rulemaking authority for the consumer directed personal assistance program. They set forth eligibility requirements for all social services districts to apply when determining whether Medicaid recipients are eligible for the program and prescribe the assessment and authorization processes that districts must follow. As permitted by the Education Law exemption, the proposed regulations include skilled nursing tasks that would otherwise have to be performed by a nurse as among the services that program participants may instruct their aides to provide. The proposed regulations also delineate social services district and fiscal intermediary responsibilities with respect to Medicaid recipients who participate in the program, including protections assured to program participants who are unable or no longer desire to continue in the program. The proposed regulations also set forth the responsibilities of program participants themselves, including their responsibility to manage their care and to hire, train and supervise their aides.

Legislative Objectives:

By enacting SSL § 365-f and SSL § 367-p, the Legislature sought to expand disabled Medicaid recipients' access to home care services, including nursing tasks, provided by aides that the recipients themselves select, train and supervise. Prior to the enactment of this statutory authority, such consumer directed care, formerly known as patient managed home care, was available only in a few social services districts as a demonstration program or on an otherwise limited basis. L. 1985, ch. 487, L. 1990, ch. 386, L. 1992, ch. 795. The program has been available on a statewide basis for several years and has been administered by social services districts pursuant to several guidance documents that the Department has issued. The proposed regulations would essentially codify such guidance and current practices consistent with the Legislature's objectives in enacting the program; namely, to make available to all eligible Medicaid recipients the opportunity to manage their home care.

Needs and Benefits:

The proposed regulations govern social services districts' administration of the consumer directed personal assistance program for Medicaid recipients. They contain eligibility standards for districts to apply when determining whether persons are eligible for the program; prescribe the assessment, reassessment, authorization and reauthorization processes that districts must follow; and set forth other social services districts' responsibilities for Medicaid recipients participating in the program. The

proposed regulations also set forth the responsibilities of fiscal intermediaries and Medicaid recipients whom districts have determined eligible for the program.

The proposed regulations are necessary because no regulatory standards currently exist for the consumer directed personal assistance program. The absence of discrete programmatic regulations has resulted in consumer, fiscal intermediary, local social services district and other long term care stakeholder's confusion about the appropriate interpretation and application of the enabling statute. Variations in program administration have impeded beneficiary's access to comparable and uniform program benefits across the state. Administrative law judges, who rely heavily on program regulations in making fair hearing determinations, have lacked a uniform body of program standards and criteria to consistently apply. Since the program's inception, the Department has supervised social services districts' administration of the program by issuing guidance documents to social services districts on an ad hoc basis and by providing routine assistance on a day-to-day basis in response to district, fiscal intermediary and recipient inquiries. Although these supervisory functions are important, they are complements to, rather than substitutions for, regulations that specify eligibility criteria and district, fiscal intermediary and recipient responsibilities. The number of program participants has also grown incrementally over time and the absence of regulations has created an escalating demand for stakeholder technical assistance at a time when state and county staffing resources are being reduced. Establishment of these regulations will also promote an understanding of consumer-directed principles and

facilitate their uniform application on a state wide basis across a broad range of stakeholders.

Costs:

Costs to Regulated Parties:

For purposes of the proposed regulations, regulated parties include fiscal intermediaries that voluntarily contract with social services districts to perform payroll processing and other responsibilities for Medicaid recipients who participate in the consumer directed personal assistance program. Approximately forty-six fiscal intermediaries currently perform these functions. Each fiscal intermediary is enrolled as a provider in the Medicaid program and may submit claims for payment to the Department's contractor that processes and pays Medicaid providers' claims according to payment rates that the Department establishes. In general, fiscal intermediary payment rates are based on the entity's allowable reported costs, including capital costs as well as administrative and direct care costs that are within certain overall ceiling or cap amounts. The proposed regulations should not result in additional costs to these regulated parties.

Costs to State and Local Governments:

The proposed regulations should not result in additional costs to county social services districts. Social services districts' costs for Medicaid program expenditures have been capped since January 1, 2006, pursuant to the Medicaid cap methodology authorized

by L. 2005, Ch. 58, Part C, § 1. Each social services district's financial contribution to the cost of Medicaid program services is limited to its Medicaid cap amount for a particular State fiscal year. The district pays no more than its cap amount, even if total Medicaid program costs increase. In that case, the State pays the excess costs.

The proposed regulations are not expected to result in additional costs to the State. There is a slightly lower Medicaid rate payable to fiscal intermediaries that participate in the consumer directed personal assistance program than is paid to home care services agencies that provide personal care services to Medicaid recipients pursuant to Department regulations at 18 NYCRR § 505.14. For the first quarter of 2009, for example, the cost to the Medicaid program for each hour of consumer directed personal assistance program services was \$13.20 and the cost per hourly unit of personal care services was \$15.36, a difference of \$2.16.

A possible exception relates to State reimbursement to social services districts for any administrative costs they may continue to incur to administer the consumer directed personal assistance program. Under the Medicaid cap, districts may claim full reimbursement from the State for costs they incur to administer the Medicaid program. The Department is unable to estimate the amount, if any, that districts have claimed, or may claim, in State reimbursement for costs incurred in administering the consumer directed personal assistance program because the current claim form does not capture this information.

Another possible exception relates to the expansion of the types of family members who may provide consumer directed personal assistance to Medicaid recipients. Currently, the Department's policy bars a consumer's spouse, parent, son, son-in-law, daughter or daughter-in-law from providing Medicaid funded services to the consumer. This is consistent with the Department's regulations governing the personal care services program. The proposed consumer directed personal assistance program regulations would no longer bar the consumer's son, son-in-law, daughter or daughter-in-law from serving as the consumer's assistant.

It is possible that this expansion of the types of family members who may provide care could increase State costs for the consumer directed personal assistance program. Medicaid recipients enrolled in the consumer directed personal assistance program would be permitted to hire their adult daughters, sons, daughters-in-law or sons-in-law to provide consumer directed personal assistance. This could increase State Medicaid costs if the voluntary care that these family members may otherwise provide to assist their parents or their spouse's parents to remain safely in their homes becomes paid for under the Medicaid program. However, savings is projected based on the proposed regulation providing an incentive for recipients to be cared for in the community by family members rather than in more costly nursing home settings.

The Department has no data quantifying the extent to which the adult children or children-in-law of Medicaid recipients provide informal non-Medicaid funded care. An

unknown portion of the universe of informal non Medicaid funded care giving could convert to Medicaid funded care under the proposed regulations.

Costs to the Department:

The proposed rules would not result in additional costs to the Department.

Local Government Mandates:

The proposed regulations impose a mandate on local social services districts. However, local social services districts have been administering the CDPAP under statutory authority pending development of discrete CDPAP regulations. In essence, the regulations will standardize state-wide guidance that was previously mandated by statute and not impose any new or additional mandate upon social services districts.

Paperwork:

The proposed regulations do not otherwise impose any new forms, reporting or other paperwork requirements.

Duplication:

The proposed regulations do not duplicate or overlap any existing State or federal requirement.

Alternatives:

The Department considered retaining the policy that currently bars a consumer's son, daughter, son-in-law or daughter-in-law from serving as the consumer directed personal assistant for that consumer. Department regulations at 18 NYCRR § 505.14(h) bar these family members from being personal care services providers. Applying this policy to the consumer directed personal assistance program would promote consistency between these home care programs. However, the Department proposes to expand the types of family members who may provide consumer directed personal assistance to include the consumer's son, daughter, son-in-law and daughter-in-law. This will increase the potential pool of available consumer directed personal assistants and provide an income to family members who previously could not afford to provide uncompensated care to their parents or their spouse's parents.

Federal Standards:

The proposed regulations do not exceed any minimum federal standards. The federal Centers for Medicare and Medicaid Services (CMS) oversees states' implementation of the Medicaid program. The CMS has not established any standards

for the consumer directed personal assistance program authorized by SSL § 365-f. It has established standards for a similar, but not identical, program authorized pursuant to Social Security Act § 1915(j).

Compliance Schedule:

Social services districts and fiscal intermediaries should be able to comply with the proposed regulations when they become effective.

Contact Person: Katherine Ceroalo
New York State Department of Health
Bureau of House Counsel, Regulatory Affairs Unit
Corning Tower Building, Rm. 2438
Empire State Plaza
Albany, New York 12237
(518) 473-7488
(518) 473- 2019 (FAX)
REGSQNA@health.state.ny.us

Consolidated Regulatory Flexibility Analysis for Small Businesses and Local Governments

Effect of Rule:

The proposed rule was developed to standardize administrative and operational requirements for a Medicaid Program that has been in existence for nearly two decades. Small businesses and local governments will not be affected by the proposed rule.

Compliance Requirements:

The proposed rule seeks to standardize the administrative and operational requirements of a Medicaid Program which has been in existence for nearly two decades. The proposed rule does not impact existing reporting, recordkeeping or affirmative action requirements that a small business or local government would have to undertake to comply with the proposed rule. A small business regulation guide is not necessary and has not been prepared.

Professional Services:

There are no professional services that small businesses will need in order to comply with the proposed rule. Local departments of social services currently administer the program that is to be governed by the proposed rule. Local departments of social services currently employ or contract with caseworkers and nurses for several

administrative functions related to this program and other home care programs. The proposed rule will not require local departments of social services to increase or alter current staffing of professional services.

Compliance Costs:

As the regulation governs an already existing program, there are no initial capital costs to a regulated business or industry or local government associated with compliance with the proposed rule. Although the regulations govern a publicly funded program, local government costs have been capped and any increase in program expenditures is borne by the State and Federal governments, thus negating any future compliance costs.

Economic and Technological Feasibility:

The regulations govern a publicly funded home health program which has existed for nearly two decades and which has consistently demonstrated economic and technological feasibility.

Minimizing Adverse Impact:

The proposed rule has no adverse economic on small businesses or local governments as it does not establish any new requirements or obligations on businesses or local governments. The proposed rule instead seeks to establish a uniform set of state-wide standards for an existing Medicaid home care program which in the past relied on the use of intermittent issuance of ad hoc policy documents to govern the program.

Small Business and Local Government Participation:

During development of the proposed regulations, the Department of Health's Office of Long Term Care met with a broad range of State Associations and stakeholders representing public and private long term care interests. Draft regulations were shared with stakeholders for comment. Appropriate concerns were incorporated into the regulations being submitted for release for public comment.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule governs a Medicaid State Plan service which is required to be provided state-wide in all counties.

Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed rule establishes regulations for a Medicaid Program which has been in existence for nearly two decades. The proposed rule does not impact existing reporting or recordkeeping requirements, nor does it impact the kinds of professional services needed to comply with the proposed rule.

Costs:

As a pre-existing program, there is no initial capital compliance costs associated with the proposed rule; because the local (county) share of Medicaid long term care costs are capped, there is no annual cost increase associated with on-going compliance of the proposed rule.

Minimizing Adverse Impact:

The proposed rule has no adverse impact on rural areas as it does not establish any new requirements or obligations on localities but instead seeks to establish uniform state-wide standards for an existing Medicaid program.

Rural Area Participation:

During development of the proposed regulations the Department of Health's Office of Long Term Care met with a broad range of State Associations and stakeholders representing public and private long term care interests. Draft regulations were shared with stakeholders, including rural county departments of social services, aging and health. Appropriate concerns were incorporated into the regulations being released for public comment.

Job Impact Statement

Nature of Impact:

The proposed regulations are meant to provide a uniform operational framework for a Title XIX home care program that has been in existence for nearly two decades. The proposed regulations reflect the current policies and procedures used in administration of the program with one exception. The proposed regulation expands the types of family members eligible to be reimbursed for provision of Consumer Directed Personal Assistance Program (CDPAP) services to include sons, sons-in-law, daughters, and daughters-in-law. As this change does not increase the number of CDPAP personal assistant jobs, but instead expands the available workforce pool, no job impact is anticipated.

Categories and Numbers Affected:

As indicated above, there are no job categories or numbers of individuals impacted by the proposed regulation.

Regions of Adverse Impact:

There are no regions in the state that will be adversely impacted by the proposed regulation.

Minimizing Adverse Impact:

The proposed regulations will not have any adverse impact on existing jobs. The regulation's expansion of family members eligible to serve as CDPAP personal assistants may help increase the pool of workers available to meet the future service demands.

Self-Employment Opportunities:

N/A

Assessment of Public Comment

Notice of adoption of rulemaking pursuant to the authority vested in the New York State Department of Health by 365-f of the Laws of 1992.

Public comment was received from 26 commentors, including the Consumer Directed Personal Assistance Association of New York State (CDPAANYNS); the New York State Nurses Association (NYSNA); NYS Disabilities Advocacy Association & Network (NYS DAAN); Selfhelp Community Services, Inc.; New York State Association of Health Care Providers, Inc. (HCP); NYS Home Care Association (HCA), ENABLE of Central NY; New York State Association of Health Care Providers, Inc. (HCP); Center for Disability Rights (CDR); Schuyler County Legislature; eight districts' representatives and the remainder, consumers. Comments were also submitted by the New York State Education Department (SED) and the Department for the Aging (DFA).

Comments received were primarily focused on 17 areas of the proposed regulations:

Subdivision b (3) Payment to relatives: The Department received 15 responses to the addition of daughters, daughters-in-law, sons and sons-in-law to the list of acceptable relatives to function as a personal assistant. The issues raised by the commentors will be addressed in policy directives providing clear guidelines for the circumstances under which such Medicaid payment would be allowed.

Subdivision b (4) Continuous 24 hour care: The Department received 4 responses all related to the requirement for receipt of 24 hour continuous care. DOH has determined the issues raised will be addressed in policy directives.

Subdivision b (12) Stable Medical Condition: The Department received 8 responses indicating confusion related to the definition of a stable medical condition. The Department revised the regulations to clarify its intent and will provide greater clarity and explanation in future program policy directives.

Subdivision d Assessment Process: The Department received a single comment related to the process related to the use of 24 hour care. This issue is not relevant to the proposed regulations.

Subdivision d (1) (i-iv) Physician's Orders: The Department received 9 responses related to completion of the order within 30 days of the office visit; the requirement that a physician must sign the orders and cannot order hours of services; and the need for orders at reassessment. Physician's orders must be signed by a physician in accordance with Social Services Law § 365-a(2)(e). NYS' existing policy of not allowing physicians to order hours of service has been upheld in litigation. (Kuppersmith v. Dowling) To maintain consistency between the PCSP and CDPAP, it is the decision to retain the language addressing the 30 day requirement.

Subdivision (d) (2)(3) Nursing Assessment: There were 7 responses received regarding the requirement that the nurse assessor determine the ability of the consumer to self direct. All 7 responders recommended that the nurse not be the sole determiner of the consumer's ability to self direct. The regulatory language has been changed.

Subdivision (d) (4) Guidelines for completion of Social Assessment: There were 4 responders, the majority of which expressed concern that a 30 day time period for completion of the assessment was too long. The DOH determined that the 30 day turn around time is consistent with the guidelines for the PCSP and made no change to assure consistency in both programs.

Subdivision (d) (5) Local Professional Director Review: There were 2 responders, one response indicated a misunderstanding of the required process. The other responder's comments will be addressed in policy directives.

Subdivision (e) Authorization Process: There were multiple comments to this section indicating a need for expansion of the area in policy directives but no change to the regulatory language is required.

Subdivision (e) (6) Combination with other services: There were 3 comments to this section but no change to regulatory language is required as policy directives will clarify and address the concerns raised.

Subdivision (f) Reassessment and Reauthorization: There were 8 comments received relating to due process, timely notice and language concerning changes in mental health status. Change was made to the regulatory language to remove the term “mental health status”. Changes were also made to clarify that timely and adequate notices must be in accordance with 18 NYCRR Part 358. The additional concerns raised will be addressed in policy directives.

Subdivision (g) Consumer Responsibilities: There were 16 comments received in this area focusing on hiring and sharing of information. Changes were made to the regulatory language to address all the concerns.

Subdivision (g) (2) Consumer Responsibilities: There were 3 comments received in this area regarding the consumer’s employment status and the need for the fiscal intermediaries to receive notification. Changes were made in the regulations to address the issues.

Subdivision (g) (3) Consumer Responsibilities: Comments were received which focused on the need for the fiscal intermediaries and/or stakeholders to be advised of changes in the employment status of the personal assistants. Changes were made in the regulations to address the issues.

Subdivision (g) (4-6) Consumer Responsibilities: HRA requested task sheets be required of the personal assistants. This issue will be addressed in policy directive. Both CDR

and CDPAANYS objected to use of any alternative system for time reporting and that task reporting should not be required. These issues are best addressed in policy directives.

Subdivision (g) (8) Consumer Responsibilities: 3 comments recommended an MOU between the consumer and the fiscal intermediary. DOH strongly supports this recommendation and a sample MOU will be included in the administrative directives but the regulations need not be changed.

Subdivision (h) Social Services District Responsibilities: There were 8 responses, approximately 25% of the responses recommended that the local district should be mandated to notify all consumers of the availability of the CDPAP. Revisions were made in accordance with the comments.

Subdivision (i) Fiscal Intermediary Responsibilities: There were 12 responses addressing the responsibilities required of the fiscal intermediaries. The responses raised concern about the need for criminal history background checks for personal assistants and the need for health assessments. Since criminal history background checks are not currently supported in statute, they cannot be required of personal assistants absent a change to the statute. To maintain consistency of health requirement for all home care workers, DOH will continue to require initial and yearly health assessments for personal assistants.

There was one discrete change made to the regulations based on comments from NYSED regarding a change in terminology that was incorrect. The term “physician’s assistant” and “specialist’s assistant” was changed to “physician assistant” and “specialist assistant”. This is consistent with NYSED regulatory language.

The majority of comments received were statements related to clarification of intent which will be addressed in policy directives.