

Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP)

Effective date: 12/23/15

SUMMARY OF EXPRESS TERMS

The proposed regulations conform the Department's personal care services regulations at 18 NYCRR § 505.14 to State law [Social Services Law ("SSL") § 365-a(2)(e)(iv)], which caps social services districts' authorizations for nutritional and environmental support functions, commonly referred to as housekeeping or Level I functions, to no more than eight hours per week for those Medical Assistance ("Medicaid") recipients who need only that level of care. The proposed regulations also revise the criteria for social services districts' authorizations of continuous personal care services (i.e. "split-shift" services) and live-in 24-hour personal care services consistent with the preliminary injunction decision in Strouchler v. Shah, 891 F.Supp. 2d 504 (S.D.N.Y. 2012).

In subdivision 505.14(a), which contains definitions and provisions relating to the scope of personal care services, the definitions of "some assistance," "total assistance," and "continuous 24-hour personal care services" are repealed. Definitions of "continuous personal care services" and "live-in 24-hour personal care services" are added. Also added is a provision that personal care services shall not be authorized to the extent that the patient's need for assistance can be met by voluntary assistance from informal caregivers, by formal services other than the Medicaid program, or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively.

With regard to nutritional and environmental support functions (“Level I” services), a provision is added limiting the authorization to no more than eight hours per week, consistent with SSL § 365-a(2)(e)(iv). The list of Level II personal care functions is amended by the addition of “turning and positioning.”

In paragraph 505.14(b)(3), which specifies factors that the nursing assessment must include, the nursing assessment must include an evaluation whether adaptive or specialized equipment or supplies can meet the patient’s need for assistance and whether such equipment or supplies can be provided safely and cost-effectively. The nursing assessment would no longer be required to include an evaluation of the degree of assistance required for each function or task, since the definitions of “some assistance” and “total assistance” are repealed.

In paragraph 505.14(b)(4), which specifies the circumstances under which the local professional director must conduct an independent medical review, such reviews would have to be conducted in cases involving live-in 24-hour personal care services as well as cases involving continuous personal care services. The nursing assessment in continuous personal care services and live-in 24-hour personal care services cases would have to document certain factors, such as whether the physician’s order had documented a medical condition that causes the patient to need frequent assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding.

The social assessment in live-in 24-hour personal care services cases would have to evaluate whether the patient’s home has sleeping accommodations for a personal care aide. If not, the district must authorize continuous personal care services; however, should the patient’s circumstances change and sleeping accommodations for a personal care aide become available in

the patient's home, the district must promptly review the case. If a reduction of the patient's continuous personal care services to live-in 24-hour personal care services is appropriate, the district must send the patient a timely and adequate notice of the proposed reduction.

In continuous personal care services and live-in 24-hour personal care services cases, the local professional director could consult with the patient's treating physician and conduct an additional assessment in the home. The final determination regarding the amount of care to be authorized would have to be made with reasonable promptness, generally not to exceed seven business days after receipt of required documentation.

In subparagraph 505.14(b)(5)(v), the provisions governing social services districts' notices to recipients for whom districts have determined to deny, reduce or discontinue personal care services are revised and reorganized.

The proposed regulations make conforming changes to the Department's regulations governing the consumer directed personal assistance program ("CDPAP"), which are at 18 NYCRR § 505.28.

In subdivision 505.28(b), which contains definitions relating to the CDPAP, the definitions of "continuous 24-hour consumer directed personal assistance" "some assistance" and "total assistance" are repealed. The definition of "consumer directed personal assistance" is amended to delete references to "some or total" assistance. Definitions of "continuous consumer directed personal assistance" and "live-in 24-hour consumer directed personal assistance" are added.

The definition of “personal care services” is amended to provide that, for individuals whose needs are limited to nutritional and environmental support functions (i.e. housekeeping tasks), personal care services shall not exceed eight hours per week.

In paragraph 505.28(d)(2), which specifies factors that the social assessment must include, the social assessment in continuous consumer directed personal assistance and live-in 24-hour consumer directed personal assistance cases must document that all alternative arrangements for meeting the individual’s medical needs have been explored and are infeasible. The social assessment for live-in 24-hour cases must evaluate whether the consumer’s home has sleeping accommodations for a consumer directed personal assistant. If not, the district must authorize continuous consumer directed personal assistance; however, if the consumer’s circumstances change and sleeping accommodations for a consumer directed personal assistant become available in the consumer’s home, the district must promptly review the case. If a reduction of the consumer’s continuous services to live-in services is appropriate, the district must send the consumer a timely and adequate notice of the proposed reduction.

In paragraph 505.28(d)(3), which specifies factors that the nursing assessment must include, the nursing assessment in continuous consumer directed personal assistance cases and live-in 24-hour consumer directed personal assistance cases would have to document certain factors, such as whether the physician’s order has documented a medical condition that causes the consumer to need frequent assistance during a calendar day with toileting, walking, transferring, turning and positioning, feeding, home health aide services, or skilled nursing tasks.

Paragraph 505.28(d)(5), which specifies requirements for the local professional director’s review, is repealed and a new paragraph 505.28(d)(5) is added. Cases involving continuous

consumer directed personal assistance and live-in 24-hour consumer directed personal assistance would have to be referred to the local professional director or designee for review and final determination of the amount of services to be authorized. The local professional director or designee would be required to consider information in the social and nursing assessments and may consult with the consumer's treating physician and conduct an additional assessment in the home. The final determination of the amount of care to be authorized must be made with reasonable promptness, generally not to exceed seven business days after receipt of all information.

Subdivision 505.28(e), which pertains to the authorization process, would be amended to provide that consumer directed personal assistance shall not be authorized to the extent that a consumer's need for assistance can be met by voluntary assistance from informal caregivers, by formal services other than the Medicaid program, or by adaptive or specialized equipment or supplies when such equipment or supplies can be provided safely and cost-effectively.

Paragraph 505.28(h)(5) would be amended to provide additional detail regarding the content of social services district notices when the district denies, reduces or discontinues consumer directed personal assistance.

Pursuant to the authority vested in the Commissioner of Health by sections 363-a(2), 365-a(2)(e) and 365-f of the Social Services Law and section 201(1)(v) of the Public Health Law, sections 505.14 and 505.28 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York, are amended to read as follows effective upon publication of a Notice of Adoption in the New York State Register:

Paragraph (1) of subdivision (a) of section 505.14 is amended to read as follows:

(1) *Personal care services* means [some or total] assistance with [personal hygiene, dressing and feeding; and] nutritional and environmental support functions and personal care functions, as specified in clauses (5)(i)(a) and (5)(ii)(a) of this subdivision. Such services must be essential to the maintenance of the patient's health and safety in his or her own home, as determined by the social services district in accordance with [the regulations of the Department of Health] this section; ordered by the attending physician; based on an assessment of the patient's needs and of the appropriateness and cost-effectiveness of services specified in subparagraph (b)(3)(iv) of this section; provided by a qualified person in accordance with a plan of care; and supervised by a registered professional nurse.

Paragraph (2) of subdivision (a) of section 505.14 is repealed and a new paragraph (2) is added to read as follows:

(2) *Continuous personal care services* means the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be

unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

Paragraph (3) of subdivision (a) of section 505.14 is repealed.

Paragraph (4) of subdivision (a) of section 505.14 is renumbered as paragraph (3) of such subdivision and the introductory sentence of such paragraph is amended to read as follows:

(3) Personal care services, as defined in this section, can be provided only if the services are medically necessary and the social services district reasonably expects that the patient's health and safety in the home can be maintained by the provision of such services, as determined in accordance with [the regulations of the Department of Health] this section.

Subparagraph (iii) is added to such renumbered paragraph (3) of subdivision (a) of section 505.14 to read as follows:

(iii)(a) Personal care services, including continuous personal care services and live-in 24-hour personal care services as defined in paragraphs (2) and (4), respectively, of this subdivision, shall not be authorized to the extent that the patient's need for assistance can be met by the following:

(1) voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends, or other responsible adult;

(2) formal services provided or funded by an entity, agency or program other than the medical assistance program; or

(3) adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.

(b) The social services district must first determine whether the patient, because of the patient's medical condition, would be otherwise eligible for personal care services, including continuous personal care services or live-in 24-hour personal care services. For patients who would be otherwise eligible for personal care services, the district must then determine whether, and the extent to which, the patient's need for assistance can be met by voluntary assistance from informal caregivers, by formal services, or by adaptive or specialized equipment or supplies, as specified in subclauses (a)(1) through (a)(3) of this subparagraph.

A new paragraph (4) of subdivision (a) of section 505.14 is added to read as follows:

(4) Live-in 24-hour personal care services means the provision of care by one personal care aide for a patient who, because of the patient's medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

Paragraph (5) of subdivision (a) of section 505.14 is repealed.

Paragraph (6) of subdivision (a) of section 505.14 is renumbered as paragraph (5) of such subdivision.

Clause (a) of subparagraph (i) of such renumbered paragraph (5) of subdivision (a) of section 505.14 is amended to read as follows:

(a) Nutritional and environmental support functions [shall] include [some or total] assistance with the following:

Clause (b) of subparagraph (i) of such renumbered paragraph (5) of subdivision (a) of section 505.14 is repealed and a new clause (b) is added to read as follows:

(b) The authorization for Level I services shall not exceed eight hours per week.

Clause (a) of subparagraph (ii) of such renumbered paragraph (5) of subdivision (a) of section 505.14 is amended to read as follows:

(a) Personal care functions [shall] include [some or total] assistance with the following:

Subclauses (7) through (12) of clause (a) of subparagraph (ii) of such renumbered paragraph (5) of subdivision (a) of section 505.14 are renumbered as subclauses (8) through (13) and new subclause (7) is added to read as follows:

(7) turning and positioning;

Clause (b) of subparagraph (ii) of such renumbered paragraph (5) of subdivision (a) of section 505.14 is repealed and a new clause (b) is added to read as follows:

(b) Before continuous personal care services or live-in 24-hour personal care services may be authorized, additional requirements for the authorization of such services, as specified in clause (b)(4)(i)(c) of this section, must be met.

Paragraph (7) of subdivision (a) of section 505.14 is renumbered as paragraph (6) of such subdivision.

Subparagraph (ii) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(ii) The social assessment shall be completed by professional staff of the [local] social services [department] district on forms approved by the [State] Department [of Social Services].

Subclause (4) of clause (b) of subparagraph (iii) of paragraph (3) of subdivision (b) of section 505.14 is repealed and a new subclause (4) is added to read as follows:

(4) an evaluation whether adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, and wheelchairs, can meet the patient's need for assistance with personal care functions and whether such equipment or supplies can be provided safely and cost-effectively;

Subclause (7) of clause (a) of subparagraph (iv) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(7) whether the patient can be served appropriately and more cost-effectively by using adaptive or specialized medical equipment or supplies covered by the MA program including, but not limited to, bedside commodes, urinals, walkers, wheelchairs, and insulin pens; and

Clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(c) the case involves the provision of continuous [24-hour] personal care services or live-in 24-hour personal care services as defined in [paragraph (a)(3)] paragraphs (a)(2) and (a)(4), respectively, of this section. Documentation for such cases [shall be] is subject to the following requirements:

Subclause (1) of clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(1) The social assessment shall demonstrate that all alternative arrangements for meeting the patient's medical needs have been explored and [/or] are infeasible including, but not limited to, the provision of personal care services in combination with other formal services or in combination with voluntary contributions of informal caregivers. In cases involving live-in 24-hour personal care services, the social assessment shall also evaluate whether the patient's home has sleeping accommodations for a personal care aide. When the patient's home has no sleeping accommodations for a personal care aide, continuous personal care services must be authorized for the patient; however, should the patient's circumstances change and sleeping accommodations for a personal care aide become available in the patient's home, the district must promptly review the case. If a reduction of the patient's continuous personal care services to live-in 24-hour personal care services is appropriate, the district must send the patient a timely and adequate notice of the proposed reduction.

Subclause (2) of clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is repealed and a new subclause (2) is added to read as follows:

(2) The nursing assessment shall document the following:

(i) whether the physician's order has documented a medical condition that causes the patient to need frequent assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding;

(ii) the specific personal care functions with which the patient needs frequent assistance during a calendar day;

(iii) the frequency at which the patient needs assistance with these personal care functions during a calendar day;

(iv) whether the patient needs similar assistance with these personal care functions during the patient's waking and sleeping hours and, if not, why not; and

(v) whether, were live-in 24-hour personal care services to be authorized, the personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

Subparagraph (ii) of paragraph (4) of subdivision (b) of section 505.14 is repealed and new subparagraphs (ii) through (iv) are added to read as follows:

(ii) The local professional director, or designee, must review the physician's order and the social and nursing assessments in accordance with the standards for services set forth in subdivision (a) of this section, and is responsible for the final determination of the amount and duration of services to be authorized.

(iii) When determining whether continuous personal care services or live-in 24-hour personal care services should be authorized, the local professional director, or designee, must consider the information in the social and nursing assessments.

(iv) The local professional director or designee may consult with the patient's treating physician and may conduct an additional assessment of the patient in the home. The final determination must be made with reasonable promptness, generally not to exceed seven 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 amount or duration of services to be authorized.

Subparagraph (i) of paragraph (5) of subdivision (b) of section 505.14 is amended to read as follows:

(i) The [local] social services [department] district shall authorize only the hours of services actually required by the patient. [When the individual providing personal care services is living in the home of the patient, the local social services department shall determine whether or not, based upon the social and nursing assessments, the patient can be safely left alone without care for a period of one or more hours per day.]

Clause (c) of subparagraph (v) of paragraph (5) of subdivision (b) of section 505.14 is repealed and a new clause (c) is added to read as follows:

(c) The social services district's determination to deny, reduce or discontinue personal care services must be stated in the client notice.

(1) Appropriate reasons and notice language to be used when denying personal care services include but are not limited to the following:

(i) the client's health and safety cannot be assured with the provision of personal care services. The notice must identify the reason or reasons that the client's health and safety cannot be assured with the provision of personal care services;

(ii) the client's medical condition is not stable. The notice must identify the client's medical condition that is not stable;

(iii) the client is not self-directing and has no one to assume those responsibilities;

(iv) the services the client needs exceed the personal care aide's scope of practice. The notice must identify the service or services that the client needs that exceeds the personal care aide's scope of practice;

(v) the client refused to cooperate in the required assessment;

(vi) a technological development, which the notice must identify, renders certain services unnecessary or less time-consuming;

(vii) the client resides in a facility or participates in another program or receives other services, which the notice must identify, which are responsible for the provision of needed personal care services; and

(viii) the client can be more appropriately and cost-effectively served through other Medicaid programs or services, which the notice must identify.

(2) Appropriate reasons and notice language to be used when reducing or discontinuing personal care services include but are not limited to the following:

(i) the client's medical or mental condition or economic or social circumstances have changed and the district determines that the personal care services provided under the last authorization or reauthorization are no longer appropriate or can be provided in fewer hours. For proposed discontinuances, this includes but is not limited to cases in which: the client's health and safety can no longer be assured with the provision of personal care services; the client's medical condition is no longer stable; the client is no longer self-directing and has no one to assume those responsibilities; or the services the client needs exceed the personal care aide's scope of practice. The notice must identify the specific change in the client's medical or mental condition or economic or social circumstances from the last authorization or reauthorization and state why the services should be reduced or discontinued as a result of the change;

(ii) a mistake occurred in the previous personal care services authorization or reauthorization. The notice must identify the specific mistake that occurred in the previous authorization or reauthorization and state why the prior services are not needed as a result of the mistake;

(iii) the client refused to cooperate in the required reassessment;

(iv) a technological development, which the notice must identify, renders certain services unnecessary or less time-consuming;

(v) the client resides in a facility or participates in another program or receives other services, which the notice must identify, which are responsible for the provision of needed personal care services; and

(vi) the client can be more appropriately and cost-effectively served through other Medicaid programs and services, which the notice must identify.

Clause (d) of subparagraph (v) of paragraph (5) of subdivision (b) of section 505.14 is amended to read as follows:

(d) The social services district may not authorize or reauthorize personal care services based upon a task-based assessment when the applicant or recipient of personal care services has been determined by the social services district or the State to be in need of 24-hour personal care, including continuous [(split-shift or multi-shift)] personal care services, live-in 24-hour [sleep-in] personal care services or the equivalent provided by formal services or informal caregivers. [The determination of the need for such 24-hour personal care, including continuous (split-shift or multi-shift) care, shall be made without regard to the availability of formal or informal caregivers to assist in the provision of such care.]

Subparagraph (vii) of paragraph (5) of subdivision (b) of section 505.14 is amended to read as follows:

(vii) All services provided shall be in accordance with the authorization. No change in functions or tasks [, degree of assistance required for each function or tasks,] or hours of services delivered shall be made without notification to, [or] and approval of, the [local] social services [department] district.

Subitem (A) of item (ii) of subclause (1) of clause (a) of subparagraph (iv) of paragraph (3) of subdivision (f) of section 505.14 is amended to read as follows:

(A) the patient's ability to be self-directing, as defined in subparagraph [(a)(4)(ii)]

(a)(3)(ii) of this section;

Item (ii) of subclause (3) of clause (a) of subparagraph (iv) of paragraph (3) of subdivision (f) of section 505.14 is amended to read as follows:

(ii) the person providing personal care services is temporarily substituting for or replacing the person assigned to provide services; the patient's plan of care is current and available to the person providing personal care services; the patient is self-directing, as defined in subparagraph [(a)(4)(ii)] (a)(3)(ii) of this section or, if non-self-directing, has a self-directing individual or other agency willing to assume responsibility for making choices about the patient's activities of daily living, as provided in such subdivision; and the person providing personal care services has the documented training or experience to appropriately and safely perform the functions and tasks identified in the patient's plan of care.

Subclause (1) of clause (a) of subparagraph (vi) of paragraph (3) of subdivision (f) of section 505.14 is amended to read as follows:

(1) the patient's ability to be self-directing, as defined in subparagraph [(a)(4)(ii)]

(a)(3)(ii) of this section;

Item (i) of subclause (2) of clause (b) of subparagraph (vi) of paragraph (3) of subdivision (f) of section 505.14 is amended to read as follows:

(i) the patient is self-directing, as defined in subparagraph [(a)(4)(ii)] (a)(3)(ii) of this section; and

Subclauses (1) and (2) of clause (b) of subparagraph (ii) of paragraph (5) of subdivision (g) of section 505.14 are amended to read as follows:

(1) is nonself-directing and has no self-directing individual or agency to assume responsibility for his or her direction, as specified in subparagraph [(a)(4)(ii)] (a)(3)(ii) of this section; or

(2) is self-directing, as defined in subparagraph [(a)(4)(ii)] (a)(3)(ii) of this section, but refuses to accept personal care services in accordance with the plan of care developed by the nurse who completed the nursing assessment.

Paragraph (2) of subdivision (b) of section 505.28 is amended to read as follows:

(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.

Paragraph (4) of subdivision (b) of section 505.28 is repealed and a new paragraph (4) is added to read as follows:

(4) continuous consumer directed personal assistance means the provision of uninterrupted care, by more than one consumer directed personal assistant, for more than 16 hours in a calendar day for a consumer who, because of the consumer's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, feeding, home health aide services, or skilled nursing tasks, and needs assistance with such frequency that a live-in 24-hour consumer directed personal

assistant would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

Paragraph (8) of subdivision (b) of section 505.28 is amended to read as follows:

(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)] 505.14(a)(5) of this Part except that, for individuals whose needs are limited to nutritional and environmental support functions, personal care services shall not exceed eight hours per week.

Paragraphs (11) and (13) of subdivision (b) of section 505.28 are repealed, paragraph (12) of such subdivision is renumbered as paragraph (11) and a new paragraph (12) is added to read as follows:

(12) *live-in 24-hour consumer directed personal assistance* means the provision of care by one consumer directed personal assistant for a consumer who, because of the consumer's medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, feeding, home health aide services, or skilled nursing tasks and whose need for assistance is sufficiently infrequent that a live-in 24-hour consumer directed personal assistant would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

Paragraph (5) of subdivision (c) of section 505.28 is amended to read as follows:

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

Subparagraphs (ii) and (iii) of paragraph (2) of subdivision (d) of section 505.28 are amended, and new subparagraphs (iv) and (v) are added, to read as follows:

(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 [.] ;

(iv) for cases involving continuous consumer directed personal assistance or live-in 24-hour consumer directed personal assistance, the social assessment shall demonstrate that all alternative arrangements for meeting the individual's medical needs have been explored and are infeasible including, but not limited to, the provision of consumer directed personal assistance in combination with other formal services or in combination with voluntary contributions of informal caregivers; and

(v) for cases involving live-in 24-hour consumer directed personal assistance, an evaluation whether the consumer's home has sleeping accommodations for a consumer directed personal assistant. When the consumer's home has no sleeping accommodations for a consumer directed personal assistant, continuous consumer directed personal

assistance must be authorized for the consumer; however, should the consumer's circumstances change and sleeping accommodations for a consumer directed personal assistant become available in the consumer's home, the district must promptly review the case. If a reduction of the consumer's continuous consumer directed personal assistance to live-in 24-hour consumer directed personal assistance is appropriate, the district must send the consumer a timely and adequate notice of the proposed reduction.

Subparagraph (i) of paragraph (3) of subdivision (d) of section 505.28 is repealed and a new subparagraph (i) is added to read as follows:

(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 or voluntary or proprietary agency under contract with the district.

Clause (d) of subparagraph (ii) of paragraph (3) of subdivision (d) of section 505.28 is amended to read as follows:

(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];

Clause (f) of subparagraph (ii) of paragraph (3) of subdivision (d) of section 505.28 is amended to read as follows:

(f) an evaluation whether the individual's need for assistance can be totally or partially met through the use of adaptive or 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;

Clauses (g) and (h) of subparagraph (ii) of paragraph (3) of subdivision (d) of section 505.28 are repealed and new clauses (g), (h) and (i) are added to read as follows:

(g) for continuous consumer directed personal assistance and live-in 24-hour consumer directed personal assistance cases, documentation of the following:

(1) whether the physician's order has documented a medical condition that causes the consumer to need frequent assistance during a calendar day with toileting, walking, transferring, turning and positioning, feeding, home health aide services, or skilled nursing tasks;

(2) the specific functions or tasks with which the consumer requires frequent assistance during a calendar day;

(3) the frequency at which the consumer requires assistance with these functions or tasks during a calendar day;

(4) whether the consumer requires similar assistance with these functions or tasks during the consumer's waking and sleeping hours and, if not, why not; and

(5) whether, were live-in 24-hour consumer directed personal assistance to be authorized, the consumer directed personal assistant would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

(h) 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 and a recommendation for the number of hours or frequency of such assistance; and

(i) recommendations for authorization of services.

Paragraph (5) of subdivision (d) of section 505.28 is repealed and a new paragraph (5) is added to read as follows:

(5) Local professional director review.

(i) If there is a disagreement among the physician's order, the nursing assessment and the social assessment, or a question regarding the amount or duration of services to be authorized, or if the case involves continuous consumer directed personal assistance or live-in 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.

(ii) The local professional director or designee must review the physician's order and the nursing and social assessments. When determining whether continuous consumer directed personal assistance or live-in 24-hour consumer directed personal assistance should be authorized, the local professional director or designee must consider the information in the social and nursing assessments. The local professional director or designee may consult with the consumer's treating physician and may conduct an additional assessment of the consumer in the home.

(iii) The local professional director or designee is responsible for the final determination regarding the amount and duration of services to be authorized. The final determination must be made with reasonable promptness, generally not to exceed seven 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 amount or duration of services to be authorized.

Paragraph (1) of subdivision (e) of section 505.28 is amended to read as follows:

(1) (i) 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.

(ii) Consumer directed personal assistance, including continuous consumer directed personal assistance and live-in 24-hour consumer directed personal assistance, shall not be authorized to the extent that the consumer's need for assistance can be met by the following:

(a) voluntary assistance available from informal caregivers including, but not limited to, the consumer's family, friends or other responsible adult;

(b) formal services provided or funded by an entity, agency or program other than the medical assistance program; or

(c) adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.

(iii) The social services district must first determine whether the consumer, because of the consumer's medical condition, would be otherwise eligible for consumer directed personal assistance, including continuous consumer directed personal assistance or live-in 24-hour consumer directed personal assistance. For consumers who would be otherwise eligible for consumer directed personal assistance, the district must then determine whether, and the extent to which, the consumer's need for assistance can be met by voluntary assistance from informal caregivers, by formal services, or by adaptive or specialized equipment or supplies, as specified in clauses (ii)(a) through (ii)(c) of this paragraph.

Paragraph (5) of subdivision (h) of Section 505.28 is amended to read as follows:

(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 [;]. The social services district's decision to deny, reduce or discontinue consumer directed personal assistance must be stated in the notice.

(i) Appropriate reasons and notice language to be used when denying consumer directed personal assistance include but are not limited to the following:

(a) the consumer's health and safety cannot be assured with the provision of consumer directed personal assistance. The notice must identify the reason or reasons that the consumer's health and safety cannot be assured with the provision of such assistance;

(b) the consumer's medical condition is not stable. The notice must identify the consumer's medical condition that is not stable;

(c) the consumer is not self-directing and has no designated representative to assume those responsibilities;

(d) the consumer refused to cooperate in the required assessment;

(e) a technological development, which the notice must identify, renders certain services unnecessary or less time-consuming;

(f) the consumer resides in a facility or participates in another program or receives other services, which the notice must identify, which are responsible for the provision of needed assistance; and

(g) the consumer or, if applicable, the consumer's designated representative is unable or unwilling to fulfill the consumer's responsibilities under the program.

(ii) Appropriate reasons and notice language to be used when reducing or discontinuing consumer directed personal assistance include but are not limited to the following:

(a) the consumer's medical or mental condition or economic or social circumstances have changed and the district determines that the consumer directed

personal assistance provided under the last authorization or reauthorization are no longer appropriate or can be provided in fewer hours. For proposed discontinuances, this includes but is not limited to cases in which: the consumer's health and safety can no longer be assured with the provision of consumer directed personal assistance; the consumer's medical condition is no longer stable; or the consumer is no longer self-directing and has no designated representative to assume those responsibilities. The notice must identify the specific change in the consumer's medical or mental condition or economic or social circumstances from the last authorization or reauthorization and state why the assistance should be reduced or discontinued as a result of the change;

(b) a mistake occurred in the previous authorization or reauthorization for consumer directed personal assistance. The notice must identify the specific mistake that occurred in the previous authorization or reauthorization and state why the prior assistance is not needed as a result of the mistake;

(c) the consumer refused to cooperate in the required reassessment;

(d) a technological development, which the notice must identify, renders certain assistance unnecessary or less time-consuming;

(e) the consumer resides in a facility or participates in another program or receives other services, which the notice must identify, which are responsible for the provision of needed assistance; and

(f) the consumer or, if applicable, the consumer's designated representative is no longer able or willing to fulfill the consumer's responsibilities under the program or the consumer no longer desires to continue in the program.

REGULATORY IMPACT STATEMENT

Statutory Authority:

Social Services Law (“SSL”) § 363-a(2) and Public Health Law § 201(1)(v) empower the Department to adopt regulations implementing the State’s Medical Assistance (“Medicaid”) program. Under SSL §§ 365-a(2)(e) and 365-f, respectively, the Medicaid program includes personal care services and the consumer directed personal assistance program (“CDPAP”). Under SSL § 365-a(2)(e)(iv), personal care services cannot exceed eight hours weekly for individuals who need assistance only with nutritional and environmental support functions.

Legislative Objectives:

The Legislature vested the Department with responsibility to develop standards for personal care services and the CDPAP. The proposed regulations are consistent with this objective. They conform the Department’s regulations to State law limiting the hours of services that may be authorized weekly for individuals who need assistance only with nutritional and environmental support functions. They also revise the standards for the authorization of personal care services and the CDPAP for Medicaid recipients who need a greater level of assistance, up to and including continuous services for 24 hours per day.

Needs and Benefits:

The proposed regulations conform the Department’s regulations to SSL § 365-a(2)(e)(iv), which caps authorizations for nutritional and environmental support functions to eight hours per week for individuals whose needs are limited to that level of care. The term “nutritional and environmental support functions” refers to shopping, light cleaning, meal preparation and similar housekeeping tasks, long referred to in the Department’s regulations as “Level I” tasks. Effective October 4, 2011, the Department adopted emergency regulations that

conformed to the recent State law by capping Level I authorizations to no more than eight hours per week. (See Emergency Rule Making, I.D. No. HLT-42-11-00014-E, published in the NYS Register on October 19, 2011.) The proposed regulations adopt this eight hour cap on nutritional and environmental support functions as a permanent rule.

Many Medicaid recipients require a greater level of assistance than do those recipients who need assistance only with nutritional and environmental support functions. These include recipients who need assistance with personal care functions such as toileting, walking, transferring, and feeding, as well as positioning. The proposed regulations revise the standards governing social services districts' authorizations of personal care services and the CDPAP for individuals who need greater assistance, up to and including live-in 24-hour services provided by one aide and 24-hour continuous services provided by more than one aide, commonly referred to as "split-shift" care.

The Department's October 4, 2011, emergency regulations established standards for the provision of continuous personal care services and live-in 24-hour personal care services. As defined in the emergency regulations, "continuous personal care services" means the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted. "Live-in 24-hour" personal care services means the provision of care by one person for a patient who, because of the patient's medical condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night is infrequent or can be predicted. Similar amendments were made to the Department's CDPAP regulations.

In Strouchler v. Shah, a federal class action filed in April 2012, plaintiff Medicaid recipients of 24-hour split-shift services challenged the Department's emergency regulations. Plaintiffs alleged, in part, that the regulations denied medically necessary 24-hour split-shift care to recipients who needed toileting or turning and positioning every two hours at night because their need for assistance, although frequent, was deemed "predictable."

On September 4, 2012, the Court preliminarily enjoined the Department to clarify the interpretation and application of the Department's emergency regulations with respect to the availability of 24-hour "split-shift care for needs that are predicted and for patients whose only nighttime need is turning and positioning." See Strouchler v. Shah, 891 F.Supp. 2d 504 (S.D.N.Y. 2012).

On October 3, 2012, the Department issued this clarification. (See GIS 12 MA/026, entitled "*Availability of 24-Hour Split-Shift Personal Care Services*," posted on the Department's website: www.health.ny.gov/health_care/medicaid/publications/gis.)

In GIS 12 MA/026, the Department noted that it was considering changes to its regulations and, in the interim, set forth specific clarifications. For example, the fact that a person's needs are "predictable" does not preclude the receipt of 24-hour split-shift care. Further, a person's need for turning and positioning or adult diaper changes, by themselves, neither preclude nor justify the receipt of 24-hour split-shift care. In all such cases, if the person has a documented medical need for the task to be performed with a frequency that would not allow a live-in aide to perform the task and still obtain an uninterrupted five hours of sleep, 24-hour split-shift care may be appropriate. This is consistent with the standard for live-in home care employees issued by the New York State Department of Labor.

The proposed regulations incorporate the concepts set forth in the Strouchler preliminary injunction decision and in GIS 12 MA/026 for determining whether 24-hour split-shift care or live-in 24-hour care would be appropriate for persons who need 24-hour care. They would define “continuous personal care services” as follows:

the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient’s medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep in an eight hour period.

The proposed regulations also define “live-in 24-hour personal care services” as follows:

the provision of care by one personal care aide for a patient who, because of the patient’s medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep in an eight hour period.

The proposed regulations clarify that the “five hours daily of uninterrupted sleep” referred to in the definitions of continuous personal care services and live-in 24-hour personal care services set forth above occurs “in an eight hour period.” This clarifying revision to the definitions of these services necessitated a minor revision to the regulatory impact statement.

The proposed regulations delete the definitions of “some assistance” and “total assistance.” These definitions are subject to misinterpretation and are not useful for determining those persons who, because of their frequent need for assistance at night, may be eligible for 24-hour split-shift care.

The proposed regulations add “turning and positioning” as a discrete personal care function, the frequent need for which could warrant 24-hour split-shift care. The Department had long interpreted the task of “transferring” as also including “turning and positioning.” Nevertheless, it is indisputable that a bed-bound individual who needs frequent turning and positioning at night may be appropriate for 24-hour split-shift care even if that individual, due to his or her bed-bound status, does not need assistance with transferring. The proposed regulations make this clear.

The proposed regulations also require that the nursing assessments that districts currently complete or obtain include an evaluation of several factors set forth in GIS 12 MA/026. The local professional director or designee would be required to consider these factors when determining whether split-shift or live-in 24-hour care was appropriate.

The proposed regulations further provide that personal care services shall not be authorized when the patient’s need for assistance can be met by the voluntary assistance of informal caregivers, by formal services, or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively.

The proposed regulations also make technical revisions to the Department’s regulations governing the content of notices that social services districts issue when denying, reducing or discontinuing personal care services.

The regulations adopt similar changes to the Department’s CDPAP regulations at 18 NYCRR § 505.28.

Costs to Regulated Parties:

Regulated parties include entities that contract with social services districts to provide personal care services or CDPAP services to Medicaid recipients. These entities include licensed home care services agencies and CDPAP fiscal intermediaries. The proposed regulations would not cause these entities to incur compliance costs. If these entities were formerly reimbursed for more than eight hours per week for providing light cleaning and other nutritional and environmental support functions to individuals whose needs were limited to such services, their Medicaid revenue has decreased. However, this is a consequence of State law and not of the proposed regulations.

Costs to State Government:

The statutory cap on nutritional and environmental support functions to no more than eight hours per week results in annual Medicaid State share cost-savings of approximately \$3.4 million. These cost-savings are a result of the change in State law rather than the proposed regulations.

The cost to State Medicaid expenditures of the remaining proposed regulations cannot be estimated with precision. Since mid-2011, and with the federal government's approval, the Department has gradually been transitioning the responsibility for the personal care services benefit from social services districts to managed care organizations and managed long term care plans. Some recipients remain excluded or exempt from enrolling in a managed care environment and would continue to receive split-shift or live-in 24-hour services that social services districts would authorize pursuant to the proposed regulations. The Department does not anticipate that costs associated with the proposed regulations would be significant. To a large extent, the proposed regulations merely clarify the Department's long-standing policies and

would thus be unlikely to increase State Medicaid costs. In addition, the proposed regulations also provide that personal care services shall not be authorized to the extent that a Medicaid recipient's need for assistance can be safely and cost-effectively met by adaptive or specialized medical equipment or supplies or by the voluntary contributions of informal caregivers or formal services other than the Medicaid program.

Costs to Local Government:

The regulation would not require social services districts to incur new costs. State law limits the amount that districts must pay for Medicaid services provided to district recipients.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

The proposed regulations require that social services districts refer continuous personal care services and continuous consumer directed personal assistance cases to the local professional director or designee for review and final determination. In addition, districts must also refer cases in which live-in 24-hour care is indicated. The proposed regulations also require local professional directors to consider additional factors, which would be set forth in the nursing assessment, when reviewing cases involving split-shift or live-in 24-hour services.

Paperwork:

Social services districts currently complete or obtain nursing assessments for personal care services and CDPAP applicants and recipients. The proposed regulations require that the nursing assessment consider whether adaptive or specialized equipment or supplies could safely and cost-effectively meet the patient's need for assistance. The proposed regulations also specify

additional factors that nursing assessments must include when split-shift and live-in 24-hour services are indicated.

Duplication:

The proposed regulations do not duplicate any existing federal, state or local regulations.

Alternatives:

There is no alternative to the proposed regulations that conform to State law by capping authorizations for nutritional and environmental support functions to eight hours per week. With respect to the remaining proposed regulations, which revise the authorization criteria for continuous and live-in cases, there is no viable alternative. The proposed regulations must be consistent with the principles articulated in the Strouchler preliminary injunction decision and the Department's GIS 12 MA/026. No significant alternatives were thus considered.

Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

Compliance Schedule:

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

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REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS

Effect of Rule:

The proposed regulations limit authorizations of nutritional and environmental support functions to no more than eight hours per week for individuals who need only that level of assistance. This primarily affects licensed home care services agencies that provide only housekeeping (“Level I”) personal care services. Most recipients of Level I personal care services live in New York City. There are currently approximately nine entities that provide only Level I services in New York City.

The proposed regulations may also affect fiscal intermediaries that contract with social services districts for the provision of consumer directed personal assistance program (“CDPAP”) services to Medicaid recipients. Fiscal intermediaries are typically non-profit entities such as independent living centers but may also include licensed home care services agencies. There are approximately 46 fiscal intermediaries. If these entities received Medicaid payment in the past for services provided to CDPAP participants who needed assistance only with nutritional and environmental support functions, these entities may have experienced a slight decrease in reimbursable service hours. This is a consequence, however, of the 2011 amendment to Social Services Law § 365-a(2)(e)(iv) and not of the proposed regulations.

The proposed regulations that would establish revised eligibility criteria for continuous services for 16 or more hours (i.e. “split-shift” services) and live-in 24-hour services would primarily affect social services districts, which assess Medicaid applicants and recipients for personal care services and the CDPAP. There are 62 counties in New York State, but only 58

social services districts. The City of New York comprises five counties but is one social services district. Most split-shift cases and live-in 24-hour services cases reside in New York City.

Compliance Requirements:

The proposed regulations do not impose compliance requirements on licensed home care services agencies that provide personal care services to Medicaid recipients or on fiscal intermediaries that contract with social services districts for the provision of CDPAP services to Medicaid recipients.

Social services districts currently assess whether Medicaid recipients who are exempt or excluded from managed care enrollment are eligible for personal care services and the CDPAP. The nursing assessments that districts currently complete or obtain would be required to evaluate certain additional factors, including whether adaptive or specialized equipment or supplies would be safe and cost-effective and factors relevant to whether continuous or live-in 24-hour care should be authorized. In addition, continuous personal care and CDPAP cases, as well as live-in 24-hour cases, would be required to be referred to the local professional director or designee for review and final determination of the amount of care to be authorized.

Professional Services:

No new or additional professional services are required in order to comply with the proposed regulations.

Compliance Costs:

No capital costs would be imposed as a result of the proposed regulations. Nor would there be annual costs of compliance.

Economic and Technological Feasibility:

There are no additional economic costs or technology requirements associated with the proposed regulations.

Minimizing Adverse Impact:

The proposed regulations should not have an adverse economic impact on social services districts. Districts currently assess Medicaid recipients who are exempt or excluded from managed care enrollment to determine whether they are eligible for personal care services or the CDPAP. Districts have long been required to refer certain cases to the local professional director or designee for final determination. Pursuant to the proposed regulations, districts would refer additional cases for such review and determination.

Small Business and Local Government Participation:

The Department solicited comments on the proposed regulations from the New York City Human Resources Administration (“HRA”), which administers the personal care services program and the CDPAP for New York City Medicaid recipients who are not enrolled in a managed care or managed long term care plan. Most of the State’s personal care services and CDPAP recipients reside in New York City. The Department revised the proposed regulations based on HRA’s comments.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a “cure period” or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility

Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

RURAL AREA FLEXIBILITY ANALYSIS

Types and Estimated Numbers of Rural Areas:

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 or fewer persons per square mile.

The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

The following nine counties have certain townships with population densities of 150 or fewer persons per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Reporting, Record Keeping and Other Compliance Requirements and Professional Services:

All social services districts, including county social services districts in rural counties, would be required to refer additional cases to their local professional directors or designees. The proposed regulations require that such referrals be made for recipients who may be appropriate for continuous services for 16 or more hours (i.e. “split-shift” services) as well as for recipients who may be appropriate for live-in 24-hour services. The regulations also specify additional documentation requirements for the nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients.

Costs:

There are no new capital or additional operating costs associated with the proposed regulations.

Minimizing Adverse Impact:

The proposed regulations would have minimal impact on rural areas. Most split-shift and live-in 24-hour care cases occur not in rural areas but in New York City.

Rural Area Participation:

The Department did not seek rural area participation with regard to the proposed regulations. With regard to that portion of the proposed regulations that caps weekly authorizations to no more than eight hours for Medicaid recipients who need assistance only with nutritional and environmental support functions, the proposed regulations merely conform to State law. With regard to that portion of the proposed regulations that revises the assessment and authorization requirements for split-shift and live-in 24-hour services, the proposed regulations primarily affect urban areas, particularly New York City, because they, not rural areas, have the greatest number of split-shift and live-in cases. In addition, this portion of the proposed regulations is intended to conform to standards articulated in the Strouchler litigation, to which the New York City Human Resources Administration was a defendant.

STATEMENT IN LIEU OF JOB IMPACT STATEMENT

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed regulations, that they would not have a substantial adverse impact on jobs and employment opportunities.

Assessment of Public Comment

The Department received comments from the following: counsel for the plaintiff class in Strouchler v. Shah (Cardozo Bet Tzedek Legal Services, JASA/Legal Services for the Elderly in Queens, and New York Legal Assistance Group) and the law firm of Hinman Straub, on behalf of a managed care plan.

1. Comment: Both commentators asked that the Department clarify the extent to which 18 NYCRR §§ 505.14, personal care services, and 505.28, consumer directed personal assistance program (“CDPAP”), apply to services provided by Medicaid managed care organizations and Medicaid managed long term care plans.

Response: The Department has not revised the proposed regulations in response to the comments. The revisions the commentators suggest would require that substantive revisions be made to the proposed regulations, necessitating the filing of yet another notice of revised rule making for an additional minimum public comment period of 30 days. This would delay the final adoption of regulations necessary to comply with the stipulation of settlement in Strouchler v. Shah. The Department is nonetheless considering how best to address these comments, whether by a future notice of proposed rule making or by other means.

2. Comment: Counsel for the Strouchler class commented that the proposed regulations must require that a live-in 24-hour personal care aide be able to obtain a total of eight hours of sleep with at least one five hour period of uninterrupted sleep.

Response: Counsel had suggested similar revisions in their comments on the proposed regulations published on September 10, 2014. In response to those earlier comments, the Department revised the proposed definitions of continuous personal care services and live-in 24-hour personal care services. As discussed in the Assessment of Public Comment published on

September 16, 2015, these proposed revisions clarify that a live-in 24-hour aide's "five hours daily of uninterrupted sleep" is within an eight hour period. This is consistent with State Department of Labor guidance, which requires that live-in aides have an eight hour sleep period and actually receive five hours of uninterrupted sleep. In view of the renewed comment on this point, however, the Department has revised the proposed regulations once again to clarify that this five hour period of uninterrupted sleep is during the aide's eight hour period of sleep. Similar revisions were made to Section 505.28 governing the CDPAP.

3. Comment: Counsel for the Strouchler class commented that the purpose of the requirement to consider whether the Medicaid recipient could be "safely left alone without care for a period of one or more hours in a calendar day" should be clarified to avoid improper denials of services. They commented that such a provision, without some clarification of the legitimate regulatory purpose, could be used to deny care to individuals with dementia who have a documented need for live-in home care services.

Response: Counsel offered similar comments in response to the proposed regulations published on September 10, 2014. At that time, the Department declined to revise the proposed regulations in response to the comment. In its Assessment of Public Comment published on September 16, 2015, the Department noted that this provision, although relocated in the proposed regulations, was not new. The Department's regulations had long provided that, when the individual providing personal care services is living in the home of the patient, the social services district must determine whether or not, based on the social and nursing assessments, the patient can be safely left alone without care for a period of one or more hours per day.

In considering the renewed public comments, however, the Department determined that this provision should be deleted. It is an anachronism, a remnant of a past practice, no longer followed, under which social services districts negotiated reimbursement rates for personal care services, including determining the number of hours of services for which a live-in aide would be paid. The Department of Labor, not social services districts, now determines the number of hours for which live-in aides must be paid. Accordingly, the revised regulations would repeal this provision as obsolete.

4. Comment: Counsel for the Strouchler class commented that the regulations must clarify that only voluntary assistance from informal caregivers may be considered and that informal caregivers cannot be compelled to assist with activities of daily living or similar tasks.

Response: The Department has not revised the proposed regulations in response to the comments. The proposed regulations address this concern, providing in no fewer than six provisions that the assistance of informal caregivers, such as family members and friends, must be voluntary. Specifically, the following provisions of the proposed personal care services regulations require that the assistance of informal caregivers be voluntary: Sections 505.14(a)(3)(iii)(a)(1), 505.14(a)(3)(iii)(b), and 505.14(b)(4)(i)(c)(1). Similarly, the following provisions of the proposed CDPAP regulations require the same: Sections 505.28(d)(2)(iv), 505.28(e)(1)(ii)(a), and 505.28(e)(1)(iii). No further regulatory recitations of this requirement are needed.