

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

Subdivision (b) of section 505.28 is amended by renumbering paragraphs (7)-(12) as (8)-(13) and adding new paragraph (7), to read as follows:

(7) *fiscal intermediary administrative costs* means the allowable costs incurred by a fiscal intermediary for performance of fiscal intermediary services under section 365-f(4-a) of the Social Services Law and fiscal intermediary responsibilities under subdivision (i) of this section.

Subdivision (j) of section 505.28 is amended to read as follows:

(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]2) 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.

(3) As authorized by paragraph (1) of this subdivision, and notwithstanding any portion of section 505.14 of this Part, the rates of reimbursement for fiscal intermediary administrative costs shall solely be made on a per consumer per month basis, with three tiers of payments. Each tier shall represent a range of authorization levels based on the number of direct care hours of consumer directed personal assistance services authorized for that consumer in a particular month and the different levels in fiscal intermediary administrative costs associated with each tier of authorization. The tiers of payment for fiscal intermediary administrative costs shall be as follows:

<b>Tier</b>	<b>Direct Care Hours Authorized Per Month</b>	<b>Monthly Rate per Consumer</b>
Tier 1	1 – 159	\$145
Tier 2	160 – 479	\$384
Tier 3	480+	\$1,036

(4) Nothing in paragraph (3) of this subdivision shall impact wages or wage related requirements for consumer directed personal assistants nor impact the ability of Medicaid managed care organizations to reimburse fiscal intermediaries for fiscal intermediary administrative costs pursuant to their provider contracts.

## REVISED REGULATORY IMPACT STATEMENT

### **Statutory Authority:**

Social Services Law (“SSL”) § 363-a and Public Health Law (“PHL”) § 201(1)(v) provide that the Department of Health (“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 (“CDPAP”) authorized by SSL § 365-f. All social services districts must assure access to CDPAP. SSL § 367-p(c).

The Department may promulgate regulations necessary to carry out the program’s objectives, which includes the provision of and payment for home care services. SSL § 365-f(1) and (5)(b). The proposed amendment to the CDPAP regulation is within the Department’s statutory rulemaking authority as it sets forth a required framework for the method of reimbursing Fiscal Intermediary (“FIs”) for administrative costs associated with personal assistant services.

### **Legislative Objectives:**

The Legislature’s objective in enacting SSL § 365-f was to establish the CDPAP program to permit chronically ill and/or physically disabled individuals receiving home care services under the medical assistance program greater flexibility and freedom of choice in obtaining such services, while ensuring that Medicaid funds are appropriately spent. This regulation keeps in place all CDPAP eligibility rules and benefits, while adjusting the methodology for paying FIs.

## **Needs and Benefits:**

Historically, the State has reimbursed FIs for administrative services based on the number of hours of CDPAP services the local social services district authorizes for each consumer receiving services. However, this methodology has led to the inefficient allocation of resources, because the payment for administrative services is, in many instances, disproportionate to administrative costs.

Administrative costs include those associated with maintaining time records, health status records and processing wages and benefits. Although these costs increase to some degree for higher needs cases, the increase is not linear, and paying administrative costs in direct proportion to hours of care provided leads to FIs receiving administrative cost payments that in some cases far exceed actual administrative costs.

The Department's rate methodology uses a per consumer per month ("PMPM") payment structure with three tiers of monthly administrative rates that are associated with different levels of expected utilization as determined by the consumer's service authorization. This rate methodology is also referred to as the Monthly Rate of reimbursement per Consumer for each tier of authorization, or simply the "Monthly Rate." For any particular case, the FI will be reimbursed the Monthly Rate that is associated with the number of direct care hours authorized for the particular Consumer. To determine the initially proposed Monthly Rates corresponding to each tier, the Department relied on managed long-term care plans cost reports, previous FI cost reports, specific cost analyses furnished by FIs to the Department, and other information furnished to the Department by FIs.

Since proposing the FI administrative rate, the Department has collected additional, more recent cost reports from home care providers and FIs. The new cost report data, in combination with other data provided by commenters, has enabled the Department to update many of the

values used to determine the Monthly Rate. The newly proposed rates are based on the following:

- Statewide distribution of consumers by tier (76.5% Tier 1, 22.1% Tier 2, and 1.3% Tier 3);
- The average number of personal assistants providing services to CDPAP consumers per tier of authorized hours;
  - Tier 1 – one and a half personal assistant per consumer;
  - Tier 2 – three personal assistants per consumer; and
  - Tier 3 – seven personal assistants per consumer.
- The reasonable cost of processing payroll and performing payroll related administrative tasks, which was validated based on externally collected data (i.e., \$8.78 per month per personal assistant);
- Payment of \$10.42 per month per personal assistant, regardless of the health insurance status of the personal assistant, to cover the cost of health status assessment and immunizations for personal assistants;
- One full-time equivalent FI staff worker per 40 CDPAP consumers, which was based on discussions with FIs, to perform the FI's administrative duties, with the assumption that the FI staff worker has a weighted average per hour total compensation cost (inclusive of fringe, overtime, payroll taxes, and training expenses) of \$45.65, reflective of the management level positions, based on prevailing wage data and information furnished to the Department by the FI industry;
- Overhead costs for each FI (i.e., \$1.25 per month per personal assistant), which is inclusive of estimated costs for space rental, maintenance of an electronic visit

verification system, cost reporting, billing system customization and maintenance, direct compliance costs, quality monitoring, and annual risk assessment requirements, and overhead costs associated with the discharge of an FI's statutory and regulatory obligations. Consistent with appropriate rate setting methodologies, overhead is not intended to reimburse for costs associated with "best practices" that are not necessary to comply with an FI's statutory or regulatory obligations.

Based on this analysis and the stated need for this change in methodology, the Department will use the Monthly Rate payment structure uniformly across the state. Accordingly, the Department no longer requires the discretion to grant social services districts the ability to use alternative payment methodologies when determining payments to FIs under 18 NYCRR § 505.28(j)(2). As a result, the former paragraph (2) has been deleted from subdivision (j) and the remaining paragraphs have been renumbered.

Notice of the new payment methodology will be issued to local departments of social services soon through an ADM. This methodology will better align administrative costs and reimbursement.

**Costs to Regulated Parties:**

There will be no additional costs to private regulated parties as a result of the regulation because the information required to bill under this revised reimbursement methodology is already available and used by FIs to determine whether services are billable to Medicaid under the current methodology. It also reflects a simplification as compared to current billing requirements because the number of monthly direct care hours received by a consumer is no longer needed for claiming the Monthly Rate. Given that the proposed methodology does not involve the collection of new information, the Department anticipates that any costs to FIs to modify or customize their billing systems and processes will be *de minimis* and included within the overhead costs used by the Department in constructing the new rates.

**Costs to State Government:**

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of the proposed regulation. Costs should decrease as reimbursement is brought into better alignment with actual costs.

**Costs to Local Government:**

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of the proposed regulation.

**Costs to the Department of Health:**

There will be no additional costs to the Department as a result of the proposed regulation.

**Local Government Mandates:**

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

The proposed regulations do not impose any new forms, reporting or other paperwork requirements on fiscal intermediaries or other entities.

**Duplication:**

The proposed regulations do not duplicate any existing federal, state or local regulations nor do they exceed any minimum federal standards.

**Alternatives:**

As discussed in the needs and benefits section, above, the Department has determined, based on the most recent information and cost data it received from managed long-term care plans, FIs and commenters, that the current reimbursement methodology for reimbursing FIs for administrative costs does not align with the actual costs incurred by FIs. For this reason, the

Department has determined that it is neither necessary nor prudent to commit to a methodology framework that maintains the current rate setting method for payments to FIs.

Commenters raised a number of potential alternative methodologies. After due consideration and analysis, and as further described below in the comment summary and responses, the Department determined that none of these alternative methodologies would better achieve the purposes of, and need for, these regulations.

**Federal Standards:**

The proposed regulations do not exceed any minimum federal standards.

**Compliance Schedule:**

There is no compliance schedule imposed by this amendment, which shall be effective upon publication of a notice of adoption.

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# **REVISED REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS**

## **Effect of Rule:**

The proposed regulations change the methodology by which FIs serving the CDPAP are reimbursed for their statutory and regulatory administrative obligations. This regulation primarily affects FIs in the delivery of these administrative services. FIs are typically not-for-profit entities, such as independent living centers, but may also include for-profit entities and entities licensed as home care services agencies. The Department currently considers that many FIs are likely to be small businesses. There are currently approximately 450 FIs in New York State.

Depending on the number of CDPAP consumers served by an FI and the number of direct care hours authorized for those CDPAP consumers in a given month, many FI entities are likely to experience a decrease in reimbursement for their administrative services as compared to the current reimbursement methodology. This decrease in reimbursement is a result of the objective to promote state-wide program uniformity and comparability by providing uniform methodologies and amounts paid to FIs based on service authorization and FI administrative costs in connection with performing their identified roles and responsibilities for personal assistants, consumers, local social services districts, and managed care organizations.

## **Compliance Requirements:**

The regulations do not impose new compliance requirements on FIs that contract with social services districts or managed care organizations for the provision of CDPAP services to Medicaid recipients.

**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 minimal economic costs or technology requirements associated with the proposed regulations. The information required by the regulations for FIs to bill for their administrative costs is already collected by and accessible to FIs. Given that the FIs use this same information to bill under the current reimbursement methodology, the Department does not expect the need for FIs to have to reconfigure substantially their billing systems or processes.

**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 CDPAP. Pursuant to the proposed regulations, districts would receive the benefits of reimbursing FIs based on a uniform and consistent reimbursement methodology. Given the desired uniformity of this reimbursement methodology, the Department has determined that permitted alternative payment methodologies that social services districts may use—and which would constitute an administrative burden to design and implement—are no longer necessary. Accordingly, the Department anticipated enhanced administrative convenience for social services districts.

**Small Business and Local Government Participation:**

The Department solicited comments on the proposed regulations from FIs, consumers, managed care organizations, and local social services district. Specifically, a FI Workgroup for

CDPAP was established in the State Fiscal Year 2019-20 established budget through Chapter 57 of the Laws of 2019 – Part G. The FI Workgroup was composed of consumers, consumer advocate groups, independent living centers, statewide associations of FIs, local social services districts, and managed care organizations. The FI Workgroup met four separate times on May 15, 2019, June 26, 2019, July 10, 2019, and August 7, 2019, and discussed topics and issues related to these proposed regulations and other topics pertinent to the operations of FIs and the important role they serve with consumers in CDPAP. Additionally, over 9,400 comments were received on the proposed regulations. The Department revised the proposed regulations based on these comments, including increasing the amounts reimbursed under each authorization tier based on data and information furnished by commenters, which are designed to prevent unnecessary FI closures and minimize any adverse impact on FIs and consumers by preserving access.

**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.

## **REVISED RURAL AREA FLEXIBILITY ANALYSIS**

### **Types and Estimated Numbers of Rural Areas:**

This rule and rates apply uniformly to all FIs throughout the state, including to any FIs that operate in any of the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

All FIs, including those serving rural counties, would be reimbursed by the Medicaid program using the reimbursement methodology set forth in these regulations. These regulations do not apply to rates negotiated between managed care organizations and FIs in these counties.

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

### **Minimizing Adverse Impact:**

The regulations are designed to have minimal impact on rural areas. In response to the comments on the proposed regulations, the Department increased the Monthly Rate of reimbursement per Consumer for each tier of authorization. Moreover, by electing to apply a weighted average wage component to the methodology, rural counties benefit from the uniform rate given that these counties likely have lower wage costs compared to FIs in urban areas.

### **Rural Area Participation:**

The Department sought public commentary from across the state. The FI Workgroup included representation from across the states, including representatives from local social services districts in Chautauqua and Greene counties, managed care organizations that serve members in rural areas, and associations that represent FIs from rural counties. Additionally, of the more than 9,400 public comments received, a substantial number came from consumers or

stakeholders representing FIs located in rural counties. These comments were considered and were reflected in the revised regulations, including the increased reimbursement that are being uniformly applied across the state and disproportionately benefit FIs located in rural counties with traditionally lower wage costs.

## **JOB IMPACT STATEMENT**

### **Nature of Impact:**

It is anticipated that no persons will be adversely affected. Certain commenters cited potential closure under the proposed regulations due to inadequate rates that failed to account to wage and overhead costs. In response, the Department considered this commentary and new data furnished by commenters and increased the Monthly Rates to (1) better ensure that there is more appropriate alignment between administrative costs and payments, and (2) promote the sustainability of FIs to perform their responsibilities and ensure that no persons—either consumers in CDPAP, personal assistants who serve people in CDPAP, or employees of FIs are impacted by the rates. Staff within FIs will have to become familiar with the new reimbursement methodology and how it impacts billing, but the information that FIs need to collect for billing remains unchanged and, in fact, has been simplified in that it utilizes only the authorized monthly direct care hours, rather than the monthly direct care hours utilized by consumers. The rule does not change any training or experience requirements.

### **Categories and Numbers Affected:**

This rule affects FIs that will be reimbursed under a different methodology for their administrative costs.

### **Regions of Adverse Impact:**

No rural areas will be adversely affected.

### **Minimizing Adverse Impact:**

Alternatives to the proposed regulations were considered, but the Department determined that these alternatives would not minimize adverse impact.

## SUMMARY OF ASSESSMENT OF PUBLIC COMMENT

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

A Notice of Proposed Rule Making was initially published in the *State Register* on December 31, 2019. During the public comment period, the Department received over 9,400 comments from consumers of consumer directed personal assistance services (CDPAS); consumer designated representatives; consumer directed personal assistants; Consumer Directed Personal Assistance Coalition (CDPAC); New York State Association of Health Care Providers (HPC); LeadingAge New York; Center for Disability Rights; Long Island Center for Independent Living (LICIL); Consumer Directed Choices Inc.; Bond, Schoeneck & King, PLLC; Caring Professionals; Consumer Directed Personal Assistance Association of New York State (CDPAANYS); NYS Home Care Association (HCA); New York Association on Independent Living (NYAIL); Premier Home Health Care Services; Southern Tier Independence Center; and Western NY Independent Living.

All comments received were reviewed and evaluated. In response to comments and the data provided to the Department, the Department increased the Monthly Rate per Consumer for: (1) Tier 1 from \$64 to \$145; (2) Tier 2 from \$164 to \$384; and (3) Tier 3 from \$522 to \$1,036.

These revisions are reflected in the followable table contained in 18 NYCRR § 505.28(j):

<b>Tier</b>	<b>Direct Care Hours Authorized Per Month</b>	<b>Monthly Rate per Consumer</b>
Tier 1	1-159	\$145
Tier 2	160-479	\$384
Tier 3	480+	\$1,036

Several proposed revisions were not incorporated because they were not consistent with the statutory authority underlying the proposed rulemaking, were determined infeasible or not preferable to the proposed rulemaking, or concerned issues outside the scope of the proposed rulemaking.



## ASSESSMENT OF PUBLIC COMMENT

- 1. Comment:** Approximately 700 comments generally noted that CDPAP helps family and friends to care for those with personal care needs. CDPAP provides financial stability to such personal assistants, thereby reducing the stress of having to choose between a job and taking care of a friend or family member in need, and allowing the family unit to remain intact. Additionally, commenters noted that CDPAP creates jobs.

**Response:** The Department appreciates and acknowledges these comments, which largely came from individuals who are employed as personal assistants or who are consumers in CDPAP. The Department notes that changes in payment methodology for fiscal intermediaries (FIs) do not modify program requirements and protections surrounding CDPAP generally. Further, such changes do not impact the payments requirements to personal assistants, which remain subject to minimum wage, wage parity requirements and other federal and state wage and hours laws, where applicable. Accordingly, the Department has determined no changes to the regulation are needed.

- 2. Comment:** Approximately 2,500 comments in support of the program highlighted how CDPAP helps to improve consumers' and caregivers' quality of life and activities of daily living (ADLs), while preventing hospitalizations, emergency room visits, and admissions into nursing homes. Commenters also emphasized that CDPAP offers independence and the freedom to determine how consumers obtain their care, including through the provision of 24-hour care.

**Response:** The Department appreciates and acknowledges these comments, which largely came from consumers in CDPAP. The Department supports CDPAP as a means of providing consumers additional independence and oversight over the delivery of home care services. The Department has determined no changes to the regulation are needed in relation to these comments.

3. **Comment:** Approximately 600 comments noted that decisions on reimbursement methodologies and changes to the program should include consumer engagement and input, and that the regulations should be rescinded until further discussions with stakeholders can occur.

**Response:** The Department agrees with the comment that consumer engagement is critical when considering changes to CDPAP. As authorized in the enacted State budget for State Fiscal Year 2019-20, the Department convened a stakeholder workgroup to discuss and establish criteria for the delivery of FI services, among other topics. This workgroup held four separate meetings on May 15, 2019; June 26, 2019; July 10, 2019; and August 7, 2019. Individual consumers and consumer advocates were invited to and participated in these meetings, which were open to the public. The input received through the workgroup process was considered in the development of the proposed regulations. Additionally, upon proposing these regulations, the Department sought and received comment letters from stakeholders, including consumers and consumer advocates, which were considered and informed revisions to the proposed regulations.

4. **Comment:** Approximately 1,800 comments expressed that reimbursement cuts should not be made to CDPAP, out of concern that such cuts would adversely impact the quality

and choice of care to which seniors and individuals with disabilities have access, the information available to caregivers, and the availability of tools needed for personal assistants to perform their jobs. Many commenters expressed their opinion that nursing homes do not provide equivalent care and that nursing home residents may be more frequently subject to neglect and abuse. The commenters expressed that nursing home placements are reduced when personal care services are furnished through CDPAP. Commenters expressed concern that the proposed regulations, to the extent they reduce reimbursement to FIs in the CDPAP and result in FIs closing or ceasing their operations, would hinder a caregiver's ability to perform their duties, receive information about their options for CDPAP, or result in avoidable admissions to nursing homes.

**Response:** Although the Department understands that underfunding FIs would lead to their closure or inability to operate as intended, the Department strongly disagrees that changing to a Monthly Rate (as defined herein) methodology for reimbursement of FI administrative costs will lead, either logically or in practice, to either the closure of FIs or increases in nursing home placements.

Based on updates to the Department's information and understanding of administrative costs, driven by new cost report data and information submitted by commenters during the initial comment period, the Department has determined that changes to the regulations are needed in order to implement the State Fiscal Year 2019-2020 enacted budget. The monthly rates per consumer were increased to better align administrative costs and payments. This increased the Monthly Rates of reimbursement per consumer for each tier of authorization (also referred to as the "Monthly Rate" or "Monthly Rates"), thus promoting the sustainability of FIs in performing their responsibilities.

**5. Comment:** Commenters expressed concern that licensed home care services agencies would not have the capacity to serve the number of individuals that would need care if CDPAP services were to be reduced or eliminated.

**Response:** As discussed above, the proposed regulations will not reduce or eliminate CDPAP services. Accordingly, the Department has determined no changes to the regulation are needed in response to this comment.

**6. Comment:** Approximately 240 commenters raised concerns that personal assistants employed by consumers in CDPAP are underpaid and would not be able to make a living if wages were reduced, resulting in increased unemployment. Commenters also expressed that payments for overtime should be reinstated, as personal assistants often work hours beyond what is stated in their timesheets and reimbursed.

**Response:** The Department notes that any changes in payments to FIs neither modify program requirements and protections surrounding CDPAP, generally, nor do they impact payment requirements to personal assistants, which remain subject to all minimum wage, wage parity requirements or other federal and state wage and labor laws. Accordingly, the Department has determined no changes to the regulation are needed.

**7. Comment:** Approximately 700 consumers expressed that they feel safer and are more comfortable having friends and family provide personal care than they are with someone who they do not know. Consumers stated that they often find that friends and family

provide more thorough, dignified care, noting that family members or friends can often speak the same language and communicate with them in a preferable manner.

**Response:** The Department appreciates and acknowledges these comments, which largely came from individuals including consumers and personal assistants. The Department also supports CDPAP as a means of providing consumers with care from friends and family with whom they are most comfortable. The Department has determined no changes to the regulation are needed as a result of these comments.

- 8. Comment:** Four commenters indicated that CDPAP should be modified to allow spouses to serve as paid personal assistants, indicating that a spouse knows the patient the best and, therefore, can provide the highest quality of care.

**Response:** Federal and state law prevents spouses, and others who are legally responsible for a consumer's care and support, from being paid as a personal assistant for that consumer under CDPAP. See 42 C.F.R. § 440.167 and Soc. Serv. Law § 365-a(2).

- 9. Comment:** Approximately 30 comments indicated that the Department should collect more data to determine appropriate administrative rates for FIs in Managed Care. Currently, the Department only collects FI data on fee-for-service (FFS) cost reports. Commenters noted that FIs are responsible for many costs that were not considered when developing the proposed regulation and rates, including but not limited to, Electronic Visit Verification (EVV), peer support, ensuring local presence (i.e. rent), annual risk assessments, quality monitoring and reporting, payroll processing, number of care hours authorized or provided per consumer, and multiple MCO billing systems.

**Response:** The Department agreed with these comments to the extent that they identified appropriate FI administrative costs that were not previously accounted for in the rates and increased the proposed rates accordingly. These updated amounts reflect additional data and information collected by the Department both from the recent calendar year 2019 cost reports for FFS and Managed Care Organization, and based on information received from commenters, including information about the positions utilized by FIs in furnishing required services and the prevailing wages for these positions. Based on these efforts, the Department's assumptions for the weighted average per hour compensation for FI staff increased from \$23.16 to \$45.65, which is fully inclusive of salary and benefits expenses for all positions, including management. Additionally, the Department used the information and data it collected to increase its assumption on FI overhead costs from \$0.75 to \$1.25 per month per personal assistant, which is intended to better reflect the costs enumerated by the commenters based on statutory and regulatory FI responsibilities and compliance requirements, such as space rental, maintenance of an EVV system, cost reporting, billing system customization and maintenance, direct compliance costs, quality monitoring, annual risk assessment requirements, and overhead costs associated with the discharge of an FI's statutory and regulatory obligations. Ultimately, these changes had the effect of increasing the Monthly Rate for each tier of authorization as compared to those included in the proposed regulations.

**10. Comment:** Approximately 10 comments noted that the Department should collect more information to improve its understanding of the number of personal assistants per consumer. Commenters noted that the Department assumes that the ratio is one personal

assistant per consumer but, in reality consumers generally require a minimum of two personal assistants. As a result, this portion of the administrative rate is calculated inaccurately.

**Response:** The Department agreed with these comments and, based on additional data provided by commenters as well as information collected by the Department, the Department adjusted the personal assistant-consumer ratio assumptions it used to increase Monthly Rates for each tier of authorization. Specifically, the ratios were increased—from one, two and one half, and five personal assistants per consumer—to one and one half, three, and seven personal assistants per consumer, for Tiers one, two and three respectively.

**11. Comment:** Approximately five comments requested that the Department delay implementation of the proposed regulations and reimbursement rate methodology until the new, more detailed cost reports for FIs are implemented. Commenters emphasized that these new reports would provide better data to help inform more appropriate rates.

**Response:** The Monthly Rates were initially developed based on cost reports from calendar year 2017. In revising the proposed regulations, the Department updated the Monthly Rates to reflect the most recent completed cost reports for FIs from calendar year 2019. The Department found that the 2019 cost reports offered sufficient information to establish the methodology contained in these regulations. The Department may change the methodology, through a new rulemaking, if future cost reports present different information on a FI's administrative costs.

**12. Comment:** Commenters observed that the Department assumed that a quarter of personal assistants need to have health screenings (including health assessments and immunizations) paid for by the FI. Commenters noted, however, that FI experience indicates that the number is more than half. The proposed rate should more clearly factor in costs that are associated with that component of the rate.

**Response:** Both the initial and increased Monthly Rates include a payment of \$10.42 per month per personal assistant, regardless of the health insurance status of the personal assistant, to cover the cost of health status assessment and immunizations for personal assistants. Given that this amount is paid to FIs as part of the rate methodology regardless of whether a particular personal assistant possesses health insurance coverage that would reimburse for the costs of the health screening, the Department views this rate assumption as sufficient to address FI costs associated with paying for the health screening.

**13. Comment:** Commenters observed that the proposed rates assume an \$8.78 per personal assistant for payroll processing and payroll related services, but does not indicate the services to which this category of expenses refers or whether this expense category should increase. Commenters request clarification on how this is calculated.

**Response:** The category for payroll processing and payroll related services addresses the costs incurred by FIs in preparing, processing, and making payments to the personal assistant consistent with payroll periods. Specific payroll processing tasks may include: (i) maintaining personal assistant data and visit schedule; (ii) processing paper time sheets; (iii) resolving paper time sheet exceptions; (iv) reviewing EVV reports and resolving



exceptions; and (v) making payroll adjustments and closing payroll. The cost assumption \$8.48 per personal assistant per month reflects data and information furnished to the Department by FIs and other industry stakeholders.

**14. Comment:** Commenters questioned whether the anticipated staffing ratio of 40 personal assistants to each FI staff member should be updated to reflect additional information or data from FIs or other industry stakeholders.

**Response:** The Department retained the staffing ratio used in development of the proposed regulations, which was based on discussions with industry stakeholders through the workgroup process described above. Commenters did not provide additional data or information to suggest that this ratio should be increased or decreased based on the functions and costs associated with statutory and regulation FI services and obligations.

**15. Comment:** The proposed three-tier methodology for reimbursement is overly complicated and burdensome to manage. Commenters requested further clarification on how the tiers were built and suggested that the tiers should be combined into a single weighted tier, which could be specific to each Managed Care Organization (MCO) or Local Department of Social Service.

**Response:** The Department has revised the Regulatory Impact Statement to provide additional information on how the Monthly Rates were constructed. Critically, the Monthly Rates for each tier of authorization reflect assumptions, supported by data and information provided by commenters, about the average number of personal assistants that serve consumers in each tier. The number of personal assistants whom an FI must

on-board, manage and process payroll for is a direct driver of additional FI costs.

Specifically, the Department's assumptions for the Monthly Rates were updated as follows:

- **Initial** – The number of personal assistants required for CDPAP consumers receiving the number of authorized hours by each tier were assumed as follows:
  - Tier 1 - 1 personal assistant per consumer
  - Tier 2 - 2.5 personal assistants per consumer
  - Tier 3 - 5 personal assistants per consumer
- **Updated** - The number of personal assistants were updated based on commenter feedback to be:
  - Tier 1 – 1.5 personal assistant per consumer
  - Tier 2 - 3 personal assistants per consumer
  - Tier 3 - 7 personal assistants per consumer

Based on the foregoing, the Department determined that the tiers were necessary to reflect meaningful administrative cost differences incurred by FIs, based on the number of CDPAP consumers they serve who qualify for each Tier, and based on the consumer's approved authorization of direct care hours. Accordingly, moving to a single, weighted tier would discount this important difference between authorized hours and cost.

Moreover, the Department considered different weighting methodologies based on consumer acuity as a potential alternative methodology. The Department did not deem such a methodology as workable because neither FIs nor the Department possess sufficient measures of consumer acuity, other than through approved monthly direct care hours and utilization, that could better align reimbursement with FI administrative costs.

Further, such a methodology would require additional complexity to implement, especially if it relies on a new measure of acuity.

**16. Comment:** The proposed regulation should include more detail on how it will be implemented, specifically on how the number of consumers in each tier will be determined and how the actual administrative rate will be paid.

**Response:** As is the case with effectively all Medicaid services, FIs will be expected to submit a claim in order to obtain reimbursement for FI administrative costs based on the Monthly Rates. Claims for FI administrative costs will be made on a per consumer basis. The adopted rule permits FIs to use the consumer's authorization in effect at any point during the month for which a claim is submitted, regardless of whether an authorization change occurs during that month, as the basis for determining the number of monthly authorized hours of CDPAP services, and thus the applicable Monthly Rate tier, for the Consumer. As noted in the previous response, administrative costs are directly associated with the number of personal assistants an FI must support for each consumer, which is more closely associated with a consumer's general level of authorization than the specific number of direct care hours actually received in a given month. The Department will issue specific billing guidance to ensure FIs are able to properly submit claims for FI administrative costs in line with the published rule.

Additionally, the final rule adopts the term "authorization" in place of "utilization" in section 505.28(j)(3), to clarify that the number of Consumers an FI may bill for is based on the number of Consumers the FI serves in a given month that have an authorization for CDPAP, and that the tier the Consumer is assigned to is based on their level of

authorization. Because FIs already have access to the number of authorized care hours, the collection and claiming of this information should not impose a new administrative burden or costs on FIs in order to bill under this new methodology. Moreover, to the extent that preparation and submission of the claim does not require the FI to track actual utilization, this billing methodology is simpler and will result in comparative administrative cost savings to FIs.

**17. Comment:** The Department should establish a regional wage component to address differences in minimum wages, wage parity, and Federal Fair Labor Standards Act (FFLSA) costs in each region, adjusted by a payroll tax factor. This would create a more predictable cashflow and subsequently lower the need to secure banking support.

**Response:** The Department considered establishing a regional wage component to address regional wage differences as an alternative to the methodology in the proposed regulations. The methodology uses a weighted average of wages to create a single statewide rate methodology, which promotes simplicity, uniformity, and consistency. Accordingly, although an alternative approach might create more predictable cash flow for certain FIs, it would create additional complexity and counter the Department's regulatory objectives.

**18. Comment:** Some commenters claimed that the proposed rates would not be sustainable for smaller FIs and would result in many closures and consolidations. Commenters noted that the rates, therefore, should account for any transition costs that might occur as a result of FI closures or consolidation (e.g., from an increased number of onboarding of

personal assistants and consumers). It was noted that this has been seen in other states where personal assistant payrolls were delayed leading to loss of services for consumers.

**Response:** In response to the concerns expressed by commenters, and the additional information and data submitted, the Department increased the Monthly Rates to ensure better alignment between administrative costs and payments, and thus promote the sustainability of FIs to perform their responsibilities. Although the Department understands that underfunding FIs could lead to their closure or inability to operate as intended, the Department strongly disagrees that a PMPM methodology for reimbursement of FI administrative costs will lead to such an outcome.

**19. Comment:** The Department should require a job impact statement. The commenters note that changes and cuts to FI funding and the closure and consolidation of FIs will affect many jobs.

**Response:** The Department has included a Revised Job Impact Statement. As stated therein, the Department does not anticipate that persons will be adversely affected due to consolidations and closures. In considering this commentary and new data furnished by commenters, the Department increased the Monthly Rate for each tier of authorization in the proposed regulations to better (1) ensure that there is greater alignment between administrative costs and payments, and (2) promote the sustainability of FIs to perform their responsibilities and ensure that no persons—meaning consumers in CDPAP, personal assistants who serve people in CDPAP, and employees of FIs—are impacted by the rates. Although the Department understands that underfunding FIs could lead to their closure or inability to operate as intended, the Department strongly disagrees that a

PMPM methodology for reimbursement of FI administrative costs will lead to such an outcome.

**20. Comment:** The Department should reconsider the need for a rural flexibility analysis.

Commenters noted that loss of FIs due to closure and consolidation as a result of the reimbursement change will disproportionately affect rural counties that already have fewer FI choices than other areas of the state.

**Response:** The Department has included a Revised Rural Area Flexibility Analysis. As stated in the Revised Rural Area Flexibility Analysis, the regulations are designed to have minimal impact on rural areas. First, in response to the other comments on the proposed regulations and data provided to the Department, the Department increased the Monthly Rates for each tier of authorization. Moreover, by electing to apply a weighted average wage component to the methodology, rural counties benefit from the uniform rate given that these counties likely have lower wage costs compared to FIs in more urban areas.

**21. Comment:** The proposed reimbursement assumes a flat \$15/hour rate for all FI staff without accounting for benefits, the various types of positions hired by the FI, or the value of work in NYC versus rest of state. Commenters noted that this will make it harder to staff quality personal assistants and increase FI turnover rates, resulting in poor care or institutionalization for consumers.

**Response:** In response to these comments, which included new agency worker cost information, as well as expected executive-level staff salaries (consistent with Executive Order 38 compensation limits of \$199,000 annually), a weighted average

per hour total compensation (inclusive of fringe) of \$45.65 has now been assumed for all FI agency staff. The adjusted compensation assumption is a large driver of the increase to the Monthly Rates for each tier of authorization.

**22. Comment:** Commenters expressed that the proposed regulations represent inadequate reimbursement for overtime by requiring unlimited overtime while cutting the rates to below minimum wage. Commenters stated that FIs typically use the administrative portion of the rate to fund overtime and that this was not accounted for in the increased rates.

**Response:** As stated in the proposed regulations, the purpose of the methodology is to reimburse FIs based on their administrative costs, including those associated with maintaining time records, health status records and processing wages and benefits. The Department appreciates these comments; however, overtime expenses for personal assistants are funded through reimbursement of direct care hours, rather than reimbursement of administrative costs.

**23. Comment:** Commenters expressed that largest new expense within the proposed regulations comes from the Request for Offers #20039 (RFO) requirement that FIs acknowledge themselves as a Joint Employer (JE). Commenters stated that acknowledgement of JE status will significantly increase liability insurance costs and potentially force FIs to provide health insurance to all personal assistants, which are costs that are not accounted for in the proposed Monthly Rates.

**Response:** With the support of the information and data furnished by the commenters and other stakeholders, the Department is establishing the Monthly Rate for each tier of authorization at a level that is adequate to reimburse FIs for their required administrative services and obligations. Specifically, the rates reflect the FI administrative costs associated with required components of the RFO, which match the regulatory obligations and responsibilities of an FI. The “additional” costs raised by these comments are already funded as part of direct care rates and, thus, do not need to be separately considered as part of an FI’s administrative costs. Additionally, New York’s Medicaid State Plan and federal case law have the JE status of FIs. As such, the Department does not anticipate any new costs associated with the acknowledgement of this status.

**24. Comment:** Commenters expressed that proposed regulations should account for additional costs associated with the need for private regulated parties to maintain appropriate records for billing purposes. Commenters claimed that there will be new costs related to the need for FIs to closely monitor the number of hours authorized or received by consumers in order to know which tier they should be placed in for appropriate billing and to update current billing systems that are not built to handle new processes.

**Response:** As discussed in other comments, the Department has adjusted certain assumptions, including the amount of overhead expenses, the average number of personal assistants serving consumers in each tier of authorization, and the total compensation expenses for FI administrative personnel, inclusive of fringe, payroll taxes, overtime, and in-service training. Based on other changes to the proposed regulations, the Department clarified that FIs will submit claims for reimbursement based on the greatest number of



direct care hours authorized for each consumer in the month for which reimbursement is sought. This information is already being collected by FIs to inform billing under the current methodology and readily attainable. Moreover, by permitting FIs to bill based on the greatest number of authorized monthly direct care hours in the month for which reimbursement is being claimed, the Department provides FIs the benefit of the highest levels of authorization on any particular day during a given month, irrespective of any change in authorization that occurred in that month. Accordingly, this process mitigates the need for FIs to incur material new costs for reconfiguration of their billing systems and processes, such that the required funding is included within the overhead and staff assumptions that informed rate development.

**25. Comment:** Commenters expressed that the proposed rates should utilize a trend factor if the Department intends to adopt a fixed dollar amount for administrative reimbursement. The commenter expressed concern that, without a trend factor, the difference between actual reasonable costs and regulatory reimbursement will exacerbate the reimbursement shortfall.

**Response:** Based on the work of the first Medicaid Redesign Team in 2011<sup>1</sup>, the Department has eliminated or declined to impose statutory and regulatory trend factors as a matter of policy because of their potential to result in reimbursement increases that do not align with increases in costs. Given this historical approach to rate setting methodology, the Department prefers instead to amend rates periodically through the

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<sup>1</sup> [https://www.health.ny.gov/health\\_care/medicaid/redesign/](https://www.health.ny.gov/health_care/medicaid/redesign/)

rulemaking or rate setting processes when appropriate based on the most recent information to ensure coverage for state plan services.

**26. Comment:** Commenters expressed that Department should retain the current reimbursement methodology, but either reduce the current cap on FI administrative expenses that an FI can claim based on the number of direct care hours for each CDPAP consumer or redefine what constitutes allowable FI administrative costs.

**Response:** The Department determined that this approach does not achieve the purpose of the regulations, in that it would maintain a reimbursement methodology that would continue to yield inefficiency by directly aligning reimbursement for FI administrative costs and the number of authorized direct care hours. The current methodology has led to inefficient allocation of resources, because the payment for administrative services is, in many instances, disproportionate to administrative costs.

**27. Comment:** Several commenters asked the Department to require that managed care organizations adopt the same payment methodology based on the Monthly Rate for each tier of authorization.

**Response:** The Department elected not to change the proposed regulation to restrict managed care organizations from negotiating rates for FI administrative services pursuant to their provider contracts. Specifically, the Department determined that such a provision would contradict the objectives and purpose of the State using managed care organizations to manage risk for its enrollees as well as federal regulations that prevent the Department from directing the use of specific fee schedules without federal approval.

Based on these principles and federal regulatory requirements, the Department does not generally intervene in rate negotiations between two private third parties, as this comment would require.

**28. Comment:** Commenters requested that the Department retain the ability for Local Departments of Social Services (LDSS) to adopt alternative payment methodologies for the reimbursement of FI administrative costs.

**Response:** In reviewing this comment, the Department determined that it promoted simplicity and consistency to have a single, uniform methodology for payment of FI services, which would be easier and more cost efficient for LDSS to administer as the CDPAP program continues to expand. Accordingly, the Department has not made changes to the proposed regulations to preserve this flexibility for LDSS.

**29. Comment:** As an alternative to the current payment methodology, which seek to better align reimbursement to an FI's administrative costs, commenters proposed retaining the current methodology while disallowing payments to FIs on a case-by-case basis where the Department or another auditor finds costs to be inappropriate.

**Response:** The Department reserves the right to disallow reimbursement when claims are submitted inappropriately. However, it is administratively onerous and impractical for the Department to review and audit all FI costs and determine whether such costs were inappropriate and non-allowable. Moreover, as with many other rate setting methodologies used by the Department, the reimbursement methodology establishes a rate (or price) for these FI administrative services. This approach is consistent with how

the Department conducts rate setting for the majority of other services it reimburses. Accordingly, the Department declined to adopt this alternative reimbursement methodology.