

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: February 13, 2019

AGENCY: MAP

FH #: 7910488K

In the Matter of the Appeal of
[REDACTED]
from a determination by the New York City
Department of Social Services

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**DECISION
AFTER
FAIR
HEARING**

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on April 9, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

For the Managed Long Term Care Plan ("Centers Plan for Healthy Living")

D. Ferguson, Fair Hearing Representative

ISSUE

Was the December 28, 2018 determination of the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living, to deny the Appellant's request for an increase of his Consumer Directed Personal Assistance Services' (CDPAS) hours from 49 hours per week (7 hours per day, 7 days per week) to 70 hours per week (10 hours per day, 7 days per week) correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age 36, has been enrolled in a Managed Long Term Care Program and has been receiving care and services, including Personal Care Services, through a Managed Long Term Care Health Plan operated by Centers Plan for Healthy Living.

2. The Appellant has been receiving Consumer Directed Personal Assistance Services' (CDPAS) hours in the amount of 49 hours per week (7 hours per day, 7 days per week).

3. The Appellant requested that his Consumer Directed Personal Assistance Services (CDPAS) authorization be increased to 10 hours per day, 7 days per week (70 hours per week).

4. On October 9, 2018, a nurse from Centers Plan for Healthy Living completed a Uniform Assessment System New York Assessment (Comprehensive) Report (UAS Report) of the Appellant's personal care needs.

5. On November 26, 2018, Centers Plan for Healthy Living issued a notice titled "Initial Adverse Determination Denial Notice" which set forth Centers Plan for Healthy Living's determination to deny the Appellant's request for an increase of his Consumer Directed Personal Assistance Services (CDPAS) authorization to 10 hours per day, 7 days per week (70 hours per week) from 7 hours per day, 7 days per week (49 hours per week) because the health care service is not medically necessary.

6. On December 28, 2018, Centers Plan for Healthy Living issued a "Final Adverse Determination" notice that stated that the Appellant's request for an increase of his Consumer Directed Personal Assistance Services (CDPAS) authorization to 70 hours per week from 49 hours per week because the service is not medically necessary.

7. On February 13, 2019, the Appellant requested the present hearing.

APPLICABLE LAW

18 NYCRR § 505.28 concerns the Consumer Directed Personal Assistance Program and states, in part:

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

(b) Definitions:

(3) "consumer directed personal assistant" means an adult who provides consumer directed personal assistance to a consumer under the consumer's instruction, supervision and direction or under the instruction, supervision and direction of the consumer's designated representative. A consumer's spouse, parent or designated representative may not be the consumer directed personal assistant for that consumer; however, a consumer directed personal assistant may include any other adult relative of the consumer who does not reside with the consumer or any

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other adult relative who resides with the consumer because the amount of care the consumer requires makes such relative's presence necessary.

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

(1) be eligible for medical assistance;

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

(3) have a stable medical condition;

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

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

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

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

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

18 NYCRR section 505.14(h) states, in part:

(2) Payment for personal care services shall not be made to a patient's spouse, parent, son, son-in-law, daughter or daughter-in-law, but may be made to another relative if that other relative:

(i) is not residing in the patient's home; or

(ii) is residing in the patient's home because the amount of care required by the patient makes his presence necessary.

**New York State Department of Health
Guidelines for Consumer Directed Personal Assistance Services**

Overview

The inclusion of Consumer Directed Personal Assistance Services (CDPAS) into the Medicaid Managed Care and Managed Long Term Care (MCO) benefit package occurred on November 1, 2012. This paper provides guidelines for the administration of this benefit.

I. Scope of Services

- a. Purpose: Consumer Directed Personal Assistance Services is intended to permit chronically ill or physically disabled individuals receiving home care services greater flexibility and freedom of choice in obtaining such services.
- b. An enrollee in need of personal care services, home health aide services or skilled nursing tasks may receive such by a consumer directed personal assistant under the instruction, supervision and direction of the enrollee or the enrollee's designated representative. Personal care services, home health aide services, and skilled nursing tasks shall have the same meaning as 18 NYCRR § 505.28 (b)(9), (7), & (11) respectively.
- c. The terms consumer directed personal assistant and designated representative shall have the same meaning as 18 NYCRR § 505.28(b)(3) & (5).

II. Authorization and Notice Requirements for CDPAS

- a. The MCO determines the need for personal care, home health aide and/or skilled nursing tasks and if the enrollee is eligible for CDPAS. Authorization of CDPAS occurs after the MCO has received the medical request for services; completion of the nursing and social assessments and the plan of care; and the enrollee has signed an acknowledgement about the roles and responsibilities of the enrollee and the MCO.
- c. The duration of the authorization must not exceed six (6) months. The duration for the authorization period must be based on the enrollee's needs as reflected in the required assessments. The MCO must consider the enrollee's prognosis, potential for recovery, and the expected duration and availability of any informal supports identified in the plan of care. See 18 NYCRR § 505.28(e)(3) & (4).
- e. Level of Service:
 - i. The assessment for home-based services identifies the tasks necessary to keep the enrollee safely in the home. The plan of care is developed by the

- enrollee with the assistance of the MCO, provider and any individuals the enrollee chooses to include.
- ii. The plan of care is developed in conjunction with the enrollee based on the assessment and considers the number of hours authorized to accomplish the tasks. These tasks may include level 1 and level 2 PCS, home health aide services and/or skilled nursing tasks.
 - iii. The MCO must authorize only the hours or frequency of services that the enrollee actually requires to maintain the enrollee's health and safety in the home. The hours or frequency of services must also include receipt of services received outside of the home. See 18 NYCRR § 505.28(e).
 - iv. CDPAS services are managed by the enrollee in accordance with the enrollee's plan of care. The authorization should provide the number of hours authorized however, it is the enrollee who decides how those hours are arranged over the week. The MCO does maintain the right to determine whether the number of hours is appropriate to the plan of care. The FI is not responsible for assuring that the member is managing the plan of care.
 - v. **NOTE:** As in the personal care services benefit, authorization for housekeeping-only tasks are limited to eight (8) hours per week.

The Model Contract for partially capitated managed long term care plans provides in relevant part that: Person centered service planning and care management entails the establishment and implementation of a written care plan and assisting Enrollees to access services authorized under the care plan. Person centered service planning includes consideration of the current and unique psychosocial and medical needs and history of the Enrollee, as well as the Enrollee's functional level and support systems. Care management includes referral to and coordination of other necessary medical, social, educational, financial and other services of the person centered service plan that support the Enrollee's psychosocial needs irrespective of whether such services are covered by the MLTCP. The Contractor's care management system shall ensure that care provided is adequate to meet the needs of individual Enrollees and is appropriately coordinated, and shall consist of both automated information systems and operational policies and procedures.

General Information System message GIS 02 MA/024, dated September 3, 2002, describes the scope of services under the consumer directed program and advises that the Consumer Directed Personal Assistance Program authorized by Social Services Law section 365-f, enables Medicaid recipients who are eligible for home care services to have greater flexibility and freedom of choice in obtaining needed services. CDPAP participants may hire, train, supervise and discharge their aides and, in particular, may exercise greater control regarding the manner in which their aides complete the various personal care tasks and other services for which the CDPAP participant has agreed to accept responsibility under the program.

Medicaid recipients eligible to participate in the CDPAP may need assistance with personal care services and/or other home care services. The CDPAP aide may perform home health aide and skilled nursing services when a registered professional nurse has determined that

the individual who will instruct the CDPAP aide is self-directing and capable of providing such instruction. [Education Law § 6908(1)(a)(iii)]. The scope of services that a CDPAP aide may provide thus includes all services provided by a personal care services aide as well as all services provided by a home health aide, registered nurse, licensed practical nurse, physical therapist, occupational therapist or speech pathologist.

Accordingly, social services districts' CDPAP assessments and authorizations should include the full scope of home care services that the Medicaid recipient may require and for which he or she, or his self-directing representative, agrees to be responsible under the CDPAP program. When issuing an authorization, districts must include not only the personal care or home health aide services tasks with which the recipient needs assistance but also any skilled tasks that the CDPAP aide will provide such as nursing services, physical therapy, occupational therapy or speech pathology services. The social services district should determine the amount of time required to complete a task by evaluating the task to be performed and discussing with the Medicaid recipient, or representative, the steps needed to complete the task. Tasks that are needed, but for which the Medicaid recipient or his or her representative is unwilling or unable to assume responsibility under the CDPAP, may be provided through another source, such as a licensed home care services agency, CHHA, LTHHCP or a private duty nurse. Social services districts' authorizations and reauthorizations of CDPAP services should be based upon their comprehensive nursing and social assessments as well as upon the guidance in this GIS message.

General Information Services Message GIS 04 MA/10 provides in relevant portion:

The purpose of this GIS is to clarify the scope of services that an aide in the Consumer Directed Personal Assistance Program ("CDPAP") may provide, particularly with regard to occupational therapy, physical therapy, and speech therapy services.

The scope of services that a CDPAP aide may provide includes all services provided by a personal care services aide, home health aide, registered nurse, or licensed practical nurse. A CDPAP aide is able to provide nursing services because the Education Law specifically exempts CDPAP aides from having to be licensed under Article 139 of the Education Law, otherwise known as the Nurse Practice Act.

The Education Law provisions governing physical therapists (Article 136), occupational therapists (Article 156) and speech therapists (Article 159) do not exempt CDPAP aides from their licensure requirements. CDPAP aides may not perform skilled services that may be performed only by these professionals or any other health care professional subject to the Education Law's licensure provisions. A CDPAP aide may not evaluate the recipient, plan a therapy program, or provide other skilled therapy services unless the aide is also licensed under the appropriate Education Law provision. Any required skilled therapy services must be provided through another source, such as a licensed home care services agency, CHHA, LTHHCP, or a licensed therapist in private practice. Although a CDPAP aide may not provide skilled therapy services directly, an aide may, under the direction of the consumer, assist with the performance of therapy programs that a licensed therapist has planned for that CDPAP recipient.

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An attachment to Local Commissioners Memorandum 06 OMM/LCM-1 contains questions and answers relating to the CDPAP. Question and Answer sequences 1, 4 and 8 are as follows:

1. Q. What is the scope of tasks allowed under the CDPAP?

A. Under the CDPAP, the personal assistant's scope of tasks includes only those tasks that may be performed by a personal care aide, home health aide, licensed practical nurse or registered professional nurse. See GIS 04 MA/010, issued April 27, 2004.

4. Q. May family members be CDPAP providers?

A. CDPAP is funded under the Personal Care Services Program (PCSP) benefit in the State's Medicaid Plan. As such, it must operate in accordance with all applicable Federal and State Medicaid statutes and regulations. Personal Care Services regulation 18 NYCRR § 505.14 (h)(2) states that payment for personal care services shall not be made to a consumer's spouse, parent, son, son-in-law, daughter, or daughter-in-law. However, payment may be made to another relative who is not residing in the consumer's home; or, is residing in the consumer's home because the amount of care required by the consumer makes his/her presence necessary.

8. Q. Can a CDPAP personal assistant perform medical procedures? Is nurse monitoring/supervision of the personal assistant/consumer required?

A. The CDPAP personal assistant may perform any personal care aide, home health aide, or nursing task that the consumer has been assessed as needing and has been prior authorized to receive; provided, however, that the personal assistant has been trained to perform the task and is supervised and directed while performing the task. Nurse supervision/monitoring is not required as the determination that the consumer (or his/her self-directing other) has the ability to direct his or her own care and train his/her assistants in needed tasks is made during the assessment process and before the prior authorization of service. Social Services Law § 365-f requires the vendor agency (fiscal intermediary) to monitor the consumer's continuing ability to fulfill his/her responsibilities in CDPAP. The LDSS must ask the fiscal intermediary how it will fulfill that responsibility.

An attachment to Local Commissioners Memorandum 06 OMM/LCM-2 contains questions and answers relating to the CDPAP. Question and Answer sequences 1, 5, 7 and 8 are as follows:

1. Q. Can a legal guardian or "self-directing other" function as a CDPAP personal assistant?

A. No. A consumer's legal guardian or "self-directing other" may not serve as a CDPAP personal assistant.

5. Q. What tasks may a CDPAP personal assistant perform and what are the imitations?

A. The CDPAP personal assistant's tasks include those which may be provided by a personal care aide, home health aide or a nurse:

♦ Personal care services tasks include the Level I tasks of assistance with certain nutritional and environmental support functions and the additional Level II tasks of assistance with certain personal care functions. See 18 NYCRR 505.14(a)(6) for a comprehensive listing of tasks.

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◆ Home health aide tasks include personal care services tasks, as well as, some health related tasks, e.g. preparation of meals for modified or complex modified diets; special skin care; use of medical equipment, supplies and devices; dressing change to stable surface wounds; performance of simple measurements and tests to routinely monitor the medical condition; performance of a maintenance exercise program; and care of an ostomy when the ostomy has reached its normal function.

◆ Nursing tasks including, but not limited to, wound care, taking vital signs, administration of medication (including administration of eye drops and injections), intermittent catheterization and bowel regime.

(Also see response to Q. #7)

7. Q. Is safety monitoring available in CDPAP?

A. Safety monitoring as a discrete task in and of itself, is not an available CDPAP service. Prior authorization of hours for the sole purpose of safety monitoring is not appropriate. Safety monitoring can and should only be provided in CDPAP as part of the personal assistant's performance of medically necessary tasks authorized or listed on the plan of care.

Social services districts should authorize assistance with recognized, medically necessary tasks. As previously advised, (See GIS 03 MA/003 Rodriguez v. Novello, issued January 24, 2003) social services districts are not required to allot time for safety monitoring as a separate task as part of the total hours authorized.

Districts are reminded that a clear and legitimate distinction exists between "safety monitoring" as a non-required independent stand alone function while no task is being performed, and the authorization of adequate time to allow for the appropriate monitoring of the consumer while providing assistance with the performance of a task, such as transferring, toileting or walking, to assure the task is safely completed.

8. Q. What is the definition of non-self-directing?

A. As defined in 92 ADM-49, a non-self directing consumer lacks the capability to make choices about the activities of daily living, **does not** understand the implications of these choices, and **does not** assume responsibility for the results of these choices. A non-self-directing individual may exhibit one or more of the following characteristics:

◆ May be delusional, disoriented at times, have periods of agitation, or demonstrate other behaviors, which are inconsistent and unpredictable;

◆ May have a tendency to wander during the day or night and to endanger his or her physical safety through exposure to hot water, extreme cold, or misuse of equipment or appliances in the home;

◆ May not understand what to do in an emergency situation or how to summon emergency assistance; or

◆ May not understand the consequences of other harmful behaviors such as, but not limited to, not following medication regimes, refusing to seek assistance in a medical emergency, or leaving gas stoves unattended.

Where there is a disagreement between the physician's order and the social, nursing and other required assessments, or there is a question about the level and amount of services to be provided, or if the case involves the provision of continuous Personal Care Services (i.e., uninterrupted care by more than one person), an independent medical review of the case must be

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completed by the local professional director, by a physician designated by the local professional director, or by a physician under contract with the Agency to review personal care services cases, who shall make the final determination about the level and amount of care to be provided.

Department policy dated January 16, 1997, regarding personal care services for children provides:

**TITLE XIX MEDICAL ASSISTANCE POLICIES AND PROCEDURES
FOR ASSESSING AND AUTHORIZING PERSONAL CARE/HOME ATTENDANT
SERVICES FOR CHILDREN.**

1. Children (persons under 18 years of age) may receive personal care/home attendant services (PC/HAS). 18 NYCRR 505.14 makes no reference to age of the recipient. Therefore, children may receive personal care services,
2. A parent, legal guardian, or other responsible adult other than the personal care aide/home attendant does not have to be present in the home while PC/HAS are being delivered to the child. The requirement for self-direction of the service when the patient is not capable of self-direction does not require that the directing person be present in the home when services are being delivered. The plan of care should contain information about who to contact in the event of an emergency. [See 18 NYCRR 505.14(a) (4) (ii)]
3. The medical necessity for PC/HAS for Medicaid eligible adults and children is established by the Physician's Order for Home Care Services. These children may be physically disabled, developmentally disabled, mentally retarded, or have some other medical diagnosis. [See 18 NYCRR 505.14(b) (3) (i)].

The nursing assessment identifies the personal care services tasks that the child is unable to complete independently and which exceed normal child care activities that a parent or guardian is expected to provide to an age appropriate child. [See 18 NYCRR 505.14(b) (3) (i i i)]

The social assessment identifies the availability, ability and motivation of the informal supports (parent, guardian or other family members) to provide the needed care. The social assessment would also explore the availability of alternative care resources such as after school programs and services available from other agencies such as the Office of Mental Retardation and Development Disabilities. [See 18 NYCRR 505.14(b) (3) (ii)]

A person legally responsible for a child, such as a parent or guardian, may request assistance with the care of his or her child. Being legally responsible for a child does not mean that that person must physically provide all of the child care services needed. Generally, a child needing personal care services results from a medical condition that impairs the child's ability to carry out age-appropriate activities of daily living. However, there may also be instances where a child's medical or social condition(s) require that an aide perform or assist with a task needed which normally would be provided by the parent or other adult. An example of this is a child at one year old who would not be expected to bathe him/herself. While bathing would normally be a parent's function, medical or social circumstances may require that personal care services be

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provided to perform or assist with the task.

4. The assessment and authorization process should be completed in a timely fashion and a written notice of the authorization must be sent to the family. Reassessments are completed semi-annually or annually.

In Rodriguez v. City of New York, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 1999), cert. denied 531 U.S. 864, the Plaintiffs were Personal Care Services recipients who alleged that they would be in receipt of inadequate service not meeting legal requirements, without the provision of safety monitoring as an independent task in their Personal Care Services authorizations. The district court had ruled in favor of the Plaintiffs, but the Court of Appeals held that the Agency is not required to provide safety monitoring as an independent Personal Care Services task in evaluating the needs of applicants for and recipients of Personal Care Services. Local Agencies were advised of this decision in GIS message 99/MA/036.

GIS 03 MA/03 was released to clarify and elaborate on the assessment of Personal Care Services pursuant to the Court's ruling in Rodriguez v. Novello and in accordance with existing Department regulations and policies. In relevant portion, this GIS Message states:

Social services districts should authorize assistance with recognized, medically necessary personal care services tasks. As previously advised, social services districts are **NOT** required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between "safety monitoring" as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

At a fair hearing concerning the denial of an application for or the adequacy of public assistance, medical assistance, HEAP, SNAP benefits or services; or an exemption from work activity requirements the appellant must establish that the agency's denial of assistance or benefits or such an exemption was not correct or that the appellant is eligible for a greater amount of assistance or benefits.

DISCUSSION

The uncontroverted evidence establishes that on December 28, 2018 Centers Plan for Healthy Living issued a "Final Adverse Determination" notice that stated that the Plan determined to deny the Appellant's request for an increase of his Consumer Directed Personal Assistance Services' (CDPAS) authorization to 10 hours per day, 7 days per week (70 hours per week) because the service is not medically necessary.

Centers Plan for Healthy Living's October 9, 2018 Uniform Assessment System (UAS) report lists the Appellant's diagnoses as arthrogyposis multiplex congenita, dermatitis,

wheelchair dependence, dizziness and giddiness, gastro-esophageal reflux disease without esophagitis, fatigue, shortness of breath, and pain. The report states that the Appellant is totally dependent on others for meal preparation, ordinary housework, shopping, walking, and toilet transfer, and navigating stairs. The Appellant requires maximal assistance with bathing, dressing upper and lower body, personal hygiene, toileting, bed mobility, and eating, walking, navigating stairs, and transportation. The Appellant requires extensive assistance with managing medications. The Appellant requires limited assistance with managing finances and phone use.

At the hearing, the Appellant contended that he requires an additional 3 hours daily for toileting, transferring, dressing, eating, and meal preparation. The Appellant stated that he uses a power chair to ambulate in his home. He stated that his aide is available from 9am to 4pm daily. He contended that he requires assistance with toileting, transferring, dressing, and meal preparation after his aide leaves at 4pm because he is unable to complete these activities when the aide is not available.

GIS 03/MA 03 provides that, in addition to scheduled needs, a patient's unpredictable needs (unscheduled) must be met. The credible evidence established that the Appellant requires assistance for activities that cannot be scheduled particularly toileting, transferring, and ambulating. Accordingly, an additional allotment of 120 minutes daily, 7 days per week for unpredictable/unscheduled needs is appropriate to meet the Appellant's unscheduled/unpredictable needs.

The credible evidence establishes that the Appellant requires additional assistance with meal preparation, toileting, and dressing his upper and lower body. UAS report establishes that the Appellant is totally dependent on others for meal preparation, dressing his upper and lower body, and toileting. The Appellant's aide is unavailable after 4pm. The evidence fails to establish that the Appellant can independently prepare meals, toilet, and dress his upper and lower body. It is noted that the activity of dressing occurs after toileting as well as after bathing. The record establishes that an additional 60 minutes daily is required to assist the Appellant with his personal care needs.

In light of the Appellant's representative's testimony and the documentary evidence presented, the evidence establishes that an allotment of personal care services in the amount of 70 hours weekly would be appropriate to meet the Appellant's needs. Therefore, Centers Plan for Healthy Living's December 28, 2018 determination to deny the Appellant's request for an increase of his Consumer Directed Personal Assistance Services' (CDPAS) authorization to 70 hours weekly of personal care services cannot be sustained.

DECISION AND ORDER

The December 28, 2018 determination of the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living, to deny the Appellant's request for an increase of his Consumer Directed Personal Assistance Services' (CDPAS) authorization to 70 hours per week was not correct and is reversed. Centers Plan for Healthy Living is directed to:

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1. Authorize Consumer Directed Personal Assistance Services' (CDPAS) hours in the amount of 70 hours weekly.
2. Notify the Appellant and Appellant's representative of its compliance with this Decision.

Should the Centers Plan for Healthy Living need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is requested, the Appellant must provide it to the Centers Plan for Healthy Living promptly to facilitate such compliance.

As required by Section 358-6.4 of the Regulations, Centers Plan for Healthy Living must comply immediately with the directives set forth above.

DATED: Albany, New York
04/24/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "T. A. Selekm", followed by a period.

Commissioner's Designee