

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: February 1, 2017

AGENCY: MAP

FH #: 7467220J

In the Matter of the Appeal of	:
	: DECISION
	AFTER
	: FAIR
	HEARING
from a determination by the New York City	:
Department of Social Services	:

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 March 31, 2017, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



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

J. Hinkson, Plan Representative

A. Jacobs, Plan Representative

ISSUE

Was the determination by the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living to deny the request of the Appellant to transition the Appellant's Personal Care Services (PCS) into Consumer Directed Personal Assistance Services (CDPAS), 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 88, who resides with his adult daughter, is in receipt of authorization for Medical Assistance, enrolled in a managed long term care plan, operated by Centers Plan for Healthy Living ("CHL") and has been in receipt of an authorization for personal

care services ("PCS") in the amount of 14 hours per week (2 hours per day, 7 days per week), under a task-based care plan.

2. On behalf of the Appellant, the Appellant's daughter requested that Appellant's authorization for personal care services of 14 hours per week, be changed to consumer directed personal assistance services ("CDPAS") in the amount of 48 hours per week (8 hours per day, 6 days per week), as well as PCS in the amount of 36 hours per week (12 hours per day, 1 day per week; and 4 hours per day, 6 days per week), for a total of 84 hours per week.

3. By notice dated February 15, 2017, CHL denied the request of the Appellant's daughter, stating that neither a person legally responsible for the eligible individual's care and support nor a designated representative may not be hired as a CDPAP assistant/aide, meaning that only an adult relative or individual not related to the eligible individual who is not legally responsible for the eligible individual may be a CDPAP.

4. On February 1, 2017, this fair hearing was requested.

APPLICABLE LAW

18 NYCRR section 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 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.

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 limitations?

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.

◆ 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.

Section 358-5.9 of the Social Services Law provides, in pertinent part, that 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 was not correct.

Social Services Law 365-f(3) is as follows:

3. Division of responsibilities. Eligible individuals who elect to participate in the program assume the responsibility for services under such program as mutually agreed to by the eligible individual and provider and as documented in the eligible individual's record, including, but not limited to, recruiting, hiring and supervising their personal assistants. For the purposes of this section, personal assistant shall mean an adult who provides services under this section to the eligible individual under the eligible individual's instruction, supervision and direction or under the instruction, supervision and direction of the eligible individual's designated representative, provided that a person legally responsible for an eligible individual's care and support, an eligible individual's spouse or designated representative may not be the personal assistant for the eligible individual; however, a personal assistant may include any other adult relative of the eligible individual, provided, however, that the program determines that the services provided by such relative are consistent with an individual's plan of care and that the aggregate cost for such services does not exceed the aggregate costs for equivalent services provided by a non-relative personal assistant. Such individuals shall be assisted as appropriate with service coverage, supervision, advocacy and management. Providers shall not be liable for fulfillment of responsibilities agreed to be undertaken by the eligible individual. This subdivision, however, shall not diminish the participating provider's liability for failure to exercise reasonable care in properly carrying out its responsibilities under this program, which shall include monitoring such individual's continuing ability to fulfill those responsibilities documented in his or her records. Failure of the individual to carry out his or her agreed to responsibilities may be considered in determining such individual's continued appropriateness for the program.

DISCUSSION

The record establishes that the Appellant, who lives with his adult daughter, is in receipt of authorization for Medical Assistance, enrolled in a managed long term care plan, operated by CHL and has been in receipt of an authorization for PCS in the amount of 14 hours per week (2 hours per day, 7 days per week), under a task-based care plan. On behalf of the Appellant, the Appellant's daughter requested that Appellant's authorization for personal care services of 14 hours per week, be changed to CDPAS in the amount of 48 hours per week (8 hours per day, 6 days per week), as well as PCS in the amount of 36 hours per week (12 hours per day, 1 day per week; and 4 hours per day, 6 days per week), for a total of 84 hours per week. By notice dated February 15, 2017, CHL denied the request of the Appellant's daughter, stating that neither a person legally responsible for the eligible individual's care and support nor a designated representative may not be hired as a CDPAP assistant/aide, meaning that only an adult relative or individual not related to the eligible individual who is not legally responsible for the eligible individual may be a CDPAP.

18 NYCRR section 505.28 (b)(3) provides that the consumer's personal assistant/aide cannot be a spouse, parent, or other relative who resides with the consumer. Specifically, a "consumer directed personal assistant" means an adult who provides consumer directed personal assistance to a consumer under the consumer's instruction, supervision and direction or under the instruction, supervision and direction of the consumer's designated representative. A consumer's spouse, parent or designated representative may not be the consumer directed personal assistant for that consumer; however, a consumer directed personal assistant may include any other adult relative of the consumer who does not reside with the consumer or any other adult relative who resides with the consumer because the amount of care the consumer requires makes such relative's presence necessary.

At the hearing, the Appellant's Representative testified that CHL's determination was incorrect because, although the Appellant's daughter lives with the Appellant and is his healthcare proxy, she is not legally responsible for the Appellant. According to the Appellant's Representative, the Appellant's daughter does not make decisions for the Appellant and does not have power of attorney for the Appellant. The Appellant's Representative claimed that the Appellant's daughter seeks to function as the Appellant's aide and that the Appellant's sister, who lives somewhere in the New York City area, would work as the CDPAP. The Appellant's Representative further claimed that the Appellant is legally responsible for himself and that he makes his own decisions.

However, the evidence presented at the hearing established that the Appellant, who is 88 years old, has been diagnosed by his treating physician with Alzheimer's and suffers from dementia. The evidence also established that the Appellant is prone to wandering, has memory loss, is unable to sign or understand documents without prompting or assistance, and has not been self-directing since 2014. Despite such evidence, the Appellant's Representative maintained that individuals with dementia can have the capacity to understand and that there does not appear to be anyone who is legally responsible for the Appellant, other than the Appellant himself. Given the foregoing, the testimony of the Appellant's Representative was wholly unpersuasive.

In matters concerning the denial of an application or the adequacy of the medial care at issue, the burden falls on the Appellant to establish the denial or inadequacy is not correct. Here, the Appellant's Representative failed to meet that burden. Accordingly, the determination by CHL must be sustained.

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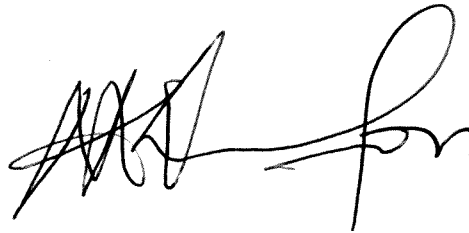
DECISION

The determination by the Appellant's Managed Long Term Care Plan, Centers Plan for Healthy Living to deny the request of the Appellant to transition the Appellant's Personal Care Services into Consumer Directed Personal Assistance Services was correct.

DATED: Albany, New York
05/24/2017

NEW YORK STATE
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to be 'M. A. [unclear]', written over a horizontal line.

Commissioner's Designee