STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: July 26, 2019
[redacted]
AGENCY: MAP
FH #: 8003176M

In the Matter of the Appeal of

[redacted]

from a determination by the New York City Department of Social Services

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 August 26, 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 ("the MLTC Plan")

Julia Rolffot, Manager of the Grievance and Appeals Department, and Fair Hearing Representative (both sessions)

ISSUE

Was the MLTC Plan's July 2019 determination to completely deny Appellant's physician's prior approval request for Licensed Practical Nurse Services in Appellant's home correct?

Was the MLTC Plan's July 2019 determination that Appellant lacked a medical necessity for Licensed Practical Nurse Services in the specific amount of 24 hours daily, 7 days weekly, as requested, 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. Appellant, [redacted], resides in an apartment with her adult son, adult daughter-in-law, and with a grandchild, and receives Medicare Parts A, B, and D.

2. Appellant is also authorized to receive Medical Assistance and, at all times relevant to this hearing, has been enrolled in the Centers Plan for Healthy Living Managed Long-Term Care Plan, which, prior to Appellant's Summer 2019 hospitalization, had authorized Appellant to receive Personal Care Services in the amount of 24 hours daily, 7 days weekly, live-in service.

3. Appellant was admitted to a hospital on June 30, 2019 with acute respiratory issues.

4. In or about mid-July 2019, Appellant's family on Appellant's behalf began to communicate with the hospital physicians and with the Plan with regard to obtaining permission for Appellant to be discharged home.

5. On or about July 18, 2019, a physician, in writing, asked the Plan for prior approval for Appellant to receive Licensed Practical Nurse Services (LPN) in her home, upon discharge, in the amount of 24 hours daily, 7 days weekly, continuous care. It may be noted here that the requested services are sometimes called Private Duty Nursing, or PDN.

6. On July 19, 2019, the Plan issued an Initial Adverse Determination, stating that the Plan denied the prior approval request. The Plan received an Internal (or "Plan") Appeal from Appellant's representative that same day (July 19, 2019).

7. On July 22, 2019, the Plan issued a Final Adverse Determination to the Appellant, again denying the prior approval request for LPN Services.

8. On July 30, 2019, with the permission of hospital physicians, and with the assurance that Appellant would receive Personal Care Services at home, backed up by Appellant's son and daughter-in-law, Appellant was discharged home.

9. Upon discharge home, the Plan resumed its authorization of Appellant's previously authorized Personal Care Services in the amount of 24 hours daily, 7 days weekly, live-in service.

10. On July 26, 2019, the Appellant's representative on Appellant's behalf requested this fair hearing to review the denial of LPN Services.

11. On August 22, 2019, Appellant's representative telefaxed to the Plan two physicians' Orders, ordering LPN Services for the Appellant in the amount of 24 hours daily.

APPLICABLE LAW

Part 438 of 42 Code of Federal Regulations (CFR) pertains to provision of Medicaid medical care, services and supplies through Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), Prepaid Ambulatory Health Plans (PAHPs) and Primary Care Case Managers (PCCMs), and the requirements for contracts for services so provided.

Section 438.236 of 42 CFR Subpart D provides, in pertinent part:

(a) Basic rule: The State must ensure, through its contracts, that each MCO and, when applicable, each PIHP and PAHP meets the requirements of this section.
(b) Adoption of practice guidelines. Each MCO and, when applicable, each PIHP and PAHP adopts practice guidelines that meet the following requirements:
(1) Are based on valid and reliable clinical evidence or a consensus of health care professionals in the particular field.
(2) Consider the needs of the MCO's, PIHP's, or PAHP's enrollees.
(3) Are adopted in consultation with contracting health care professionals.
(4) Are reviewed and updated periodically as appropriate.
(c) Dissemination of guidelines. Each MCO, PIHP, and PAHP disseminates the guidelines to all affected providers and, upon request, to enrollees and potential enrollees.
(d) Application of guidelines. Decisions for utilization management, enrollee education, coverage of services, and other areas to which the guidelines apply are consistent with the guidelines.

With respect to notice requirements, Section 438.210 of 42 CFR Subpart D provides, in pertinent part:

(c) Notice of adverse action. Each contract must provide for the MCO, PIHP, or PAHP to notify the requesting provider, and give the enrollee written notice of any decision by the MCO, PIHP, or PAHP to deny a service authorization request, or to authorize a service in an amount, duration, or scope that is less than requested. For MCOs and PIHPs, the notice must meet the requirements of Sec. 438.404, except that the notice to the provider need not be in writing.

(d) Timeframe for decisions. Each MCO, PIHP, or PAHP contract must provide for the following decisions and notices:

(1) Standard authorization decisions. For standard authorization decisions, provide notice as expeditiously as the enrollee's health condition requires and within State-established timeframes that may not exceed 14 calendar days following receipt of the request for service…

Section 438.404(b) of 42 CFR Subpart F provides in part:

(b) Content of notice. The notice must explain the following:
(1) The action the MCO or PIHP or its contractor has taken or intends to take;
(2) The reasons for the action...

Section 438.210 of 42 CFR Subpart D provides, in pertinent part:

(a) Coverage - Each contract with an MCO, PIHP, or PAHP must do the following:
(1) Identify, define, and specify the amount, duration, and scope of each service that the MCO, PIHP, or PAHP is required to offer.
(2) Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under fee-for-service Medicaid, as set forth in Sec. 440.230.
(3) Provide that the MCO, PIHP, or PAHP--
(i) Must ensure that the services are sufficient in amount, duration, or scope to reasonably be expected to achieve the purpose for which the services are furnished.
(ii) May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the beneficiary;
(iii) May place appropriate limits on a service
(A) On the basis of criteria applied under the State plan, such as medical necessity; or
(B) For the purpose of utilization control, provided the services furnished can reasonably be expected to achieve their purpose, as required in paragraph (a)(3)(i) of this section; and
(4) Specify what constitutes “medically necessary services”" in a manner that:
(i) Is no more restrictive than that used in the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures; and
(ii) Addresses the extent to which the MCO, PIHP, or PAHP is responsible for covering services related to the following:
(A) The prevention, diagnosis, and treatment of health impairments.
(B) The ability to achieve age-appropriate growth and development.
(C) The ability to attain, maintain, or regain functional capacity.

(b) Authorization of services. For the processing of requests for initial and continuing authorizations of services, each contract must require:
(1) That the MCO, PIHP, or PAHP and its subcontractors have in place, and follow, written policies and procedures.
(2) That the MCO, PIHP, or PAHP:
(i) Have in effect mechanisms to ensure consistent application of review criteria for authorization decisions; and
(ii) Consult with the requesting provider when appropriate.
(3) That any decision to deny a service authorization request or to authorize a service in

an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollee's condition or disease....

Private Duty Nursing

Section 505.8 of the Regulations provides, in pertinent part:

(a) Where nursing care may be provided. Nursing service as medically needed shall be provided to medical assistance recipients in the person's home or in a hospital.

(b) Who may provide nursing care.
(1) Nursing care to patients in New York State shall be provided by a person possessing a license and current registration from the New York State Education Department to practice as a registered professional nurse or licensed practical nurse.

(d) Nursing service in the home.
(1) For necessary nursing service to be provided in the person's home, full and primary use shall be made of the services of an approved home health agency, including a hospital-based home health agency.
(2) Such service shall be provided on a per visit basis and may include not only intermittent or part-time nursing service for the patient but also instructions to members of the patient's family in procedures necessary for the care of the patient.
(3) **Service of a registered professional nurse or of a licensed practical nurse on a private practitioner basis may be provided to a patient in his own home only under the following circumstances**:
(i) when there is no approved home health agency available to provide the intermittent or part-time nursing services needed by the patient;
(ii) when the patient is in need of individual and continuous nursing care beyond that available from an approved home health agency.

(e) Prior approval and prior authorization. Prior approval by the local professional director and prior authorization by the local social services official shall be required for nursing service provided in a person's home or in a hospital by a private practicing registered professional or licensed practical nurse, except that in an urgent situation the attending physician may order the service of such nurse for no more than two nursing days and immediately notify the local social services official and the appropriate medical director.

(f) Physician's written order required. All nursing services provided in the patient's home or in a hospital shall be in accordance with the attending physician's written order and plan of treatment, however, in extraordinary circumstances and for valid reasons which must be documented, nursing service in the home may be initiated by a

home health agency before the physician sees the patient. A physician's written order is required for all such nursing services in excess of the initial two visits.

The Private Duty Nursing Manual Policy Guidelines states, in relevant part, all private duty nursing shall be in accordance with the attending physician's written order and treatment plan. It further states that approval for private duty nursing services shall be at the licensed practical nursing level unless:

(a) The physician's order specifically justifies in writing the reasons why registered nurse (RN) nurse services are necessary. In this case, the Medicaid Director or local designee must be in agreement.
(b) The required skills are outside the scope of practice for a licensed practical nurse (LPN) as determined by the NYSED.

Section 6902 of Article 139 of the Education Law distinguishes between the legal definitions of RNs and LPNs as follows:

The practice of the profession of nursing as a registered professional nurse (RN) is defined as diagnosing and treating human responses to actual or potential health problems through such services as case finding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens prescribed by a licensed physician, dentist or other licensed health care provider legally authorized under this title and in accordance with the commissioner's regulations. A nursing regimen shall be consistent with and shall not vary any existing medical regimen.

The practice of nursing as a licensed practical nurse (LPN) is defined as performing tasks and responsibilities within the framework of case finding, health teaching, health counseling, and provision of supportive and restorative care under the direction of a registered professional nurse or licensed physician, dentist or other licensed health care provider legally authorized under this title and in accordance with the commissioner's regulations.

Furthermore, section 6901 of Article 139 of the Education Law provides the following definitions relating to the scope of practice of RNs:

1. "Diagnosing" in the context of nursing practice means that identification of and discrimination between physical and psychosocial signs and symptoms essential to effective execution and management of the nursing regimen. Such diagnostic privilege is distinct from a medical diagnosis.
2. "Treating" means selection and performance of those therapeutic measures essential to the effective execution and management of the nursing regimen, and execution of any prescribed medical regimen.
3. "Human Responses" means those signs, symptoms and processes which denote the individual's interaction with an actual or potential health problem.

Section 6902, cited above, does not include nursing diagnosis within the scope of practice of LPNs.

The New York State Education Department's Practice Information provides guidelines as to the scope of practice between RNs and LPNs. Said guidelines states that RNs executes medical orders from select authorized health care providers, function independently in providing nursing care in such areas as the ongoing surveillance and nursing intervention to rescue chronically ill persons from development of negative effects and secondary results of treatments.

It further provides that nursing diagnosis is interpreted as including patient assessment, that is, the collection and interpretation of patient clinical data, the development of nursing care goals and the subsequent establishment of a nursing care plan. Additionally, LPNs do not have assessment privileges; they may not interpret patient clinical data or act independently on such data; they may not triage; they may not create, initiate, or alter nursing care goals or establish nursing care plans. Under the direction of the RN, LPNs may administer medications, provide nursing treatments, and gather patient measurements, signs, and symptoms that can be used by the RN in making decisions about the nursing care of specific patients. However, they may not function independent of direction.

MLTC Policy 13.07: dated March 13, 2013, is being provided as background on Fee For Service Medicaid private duty nursing services prior to initiation of transitioning cases in Mandatory Managed Long Term Care counties. NYCRR Title 10 and Title 18 contain regulations for the provision of Medicaid coverage of private duty nursing services in the patient's home or in a school.

Private duty nursing services may be provided when a written assessment from a Certified Home Health Agency, local Social Services department or recognized agent of a local Social Services department indicates that the patient is in need of either continuous nursing services which are beyond the scope of care available from a certified home health agency, or intermittent nursing services which are normally provided by the certified home health agency but which are unavailable. Providers of private duty nursing services are limited to home care service agencies licensed in accordance with the provisions of Part 765 and to private practicing licensed practical nurses and registered professional nurses. Private duty nursing services are presently provided by a licensed home care services agency or a Medicaid enrolled independent provider.

Prior approval by New York Medicaid or the local designee is required for private duty nursing services. **Requests for private duty nursing services should**:

1. Identify the private duty nursing provider;
2. Identify the informal support caregiver;
3. Include a statement from the ordering practitioner that the informal support caregiver is trained and capable to meet <u>all of the skilled and unskilled needs of the patient</u>; and
4. Include a written physician's order which provides diagnosis, medications, treatments, prognosis and other pertinent patient information.

Approval of private duty nursing services is for a period not to exceed six months with required recertification every six months thereafter. Determinations for continued care beyond the initial three months must be approved. See attachment below (Informational Letter 08 OHIP/ INF-5) for supplemental information.

Informational Letter 08 OHIP/ INF-5 addresses frequently asked questions concerning private duty nursing services in the community through the Medicaid program. Guide to Accessing Medicaid Private Duty Nursing Services in the Community advises, in pertinent part:

How does a Medicaid client in the community obtain private duty nursing services?

In general, most new private duty nursing cases are Medicaid clients who have been discharged to the community from a hospital or a nursing facility. In those cases, the hospital or nursing facility discharge planner is primarily responsible for referring the Medicaid client to private duty nursing services, when appropriate. However, Medicaid clients already residing in the community, or their representatives, may also seek to obtain private duty nursing services.

Appendix G to the Managed Long Term Care Partial Capitation Contract advises in relevant part that Private duty nursing services are covered as medically necessary.

Appendix J to the Managed Long Term Care Partial Capitation Contract advises in relevant part that Private duty nursing services as medically necessary are continuous and skilled nursing care provided in an Enrollee's home, or under certain conditions a Hospital or Nursing Home, by properly licensed registered professional or licensed practical nurses.

Social Services Law Section 365-f relates to the Consumer-Directed Personal Assistance Program, and states, in part:

> Purpose and intent. The consumer directed personal assistance program is intended 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. The department shall regularly monitor district participation in the program by reviewing the implementation plans submitted pursuant to this section. The department shall provide guidance to the districts to improve compliance with implementation plans and promote consistency among counties regarding approved service levels based on the assessments required by this section. In addition, the department shall provide technical assistance and such other assistance as may be necessary to assist such districts in assuring access to the program for eligible individuals.

18 NYCRR section 505.28 provides, in part:

> "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."

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.

The purpose of GIS message 04 MA/010, dated April 27, 2004, 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. As stated in GIS 02 MA/024, social services districts' CDPAP assessments and authorizations should continue to include the full scope of home care services that the Medicaid recipient requires and for which he or she, or his self-directing representative, agrees to be responsible under the CDPAP program. A district's CDPAP authorizations must include assistance needed with personal care, home health aide and skilled nursing tasks, and also any physical therapy, occupational therapy, and speech therapy services that the recipient may require and the aide may perform.

The purpose of Local Commissioners' Memorandum 06 OMM/LCM-1, dated June 30, 2006, is to transmit to the local social services districts a compilation of answers to questions submitted by local social services districts, fiscal intermediaries and Consumer Directed Personal Assistance Program (CDPAP) consumers regarding the CDPAP. The Department continues to accept questions regarding administration of CDPAP and will be issuing additional questions and answers in the near future. In 1996 the legislature passed Social Services Law 365-f establishing the CDPAP to support chronically ill and/or physically disabled individuals receiving home care under the Medical Assistance program greater flexibility and freedom of choice in obtaining such services. CDPAP, is operated in New York State as a Medicaid State Plan service, under the Personal Care Services (PCS) Program benefit. As such, until discrete regulations governing that program's operations are issued by the Department, the district must follow all applicable PCS assessment and authorization processes and policies. The scope of services that may be authorized under CDPAP include the scope of tasks that may be provided by a Personal Care Aide, Home Health Aide, Licensed Practical Nurse or Registered Professional Nurse. The attached Questions and Answers document will serve as an additional guide for local districts to use in the administration of the CDPAP.

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.
2. **Q**. How/When may 24/7 CDPAP services be authorized?

A. 24/7 CDPAP services may be authorized when the local district has determined that the consumer meets the criteria for continuous care at 18 NYCRR § 505.14(a)(3). Districts are reminded, however, that Department regulations provide that districts may not authorize or reauthorize personal care services based upon a task-based assessment when the district has determined that the consumer needs 24 hour personal care services, whether continuous (split-shift or multi-shift), 24 hour sleep-in care or the equivalent provided by formal or informal caregivers. See 18 NYCRR § 505.14(b)(5)(v)(d); GIS 01 MA/044 issued 12/24/01; and Q & A #3, herein, for further details.

3. **Q**. Can one person provide 24 hour continuous care?

A. No. One person may not provide 24 hour continuous care. In accordance with 18 NYCRR § 505.14(a)(3) "Continuous 24-hour personal care services shall mean the provision of uninterrupted care, by more than one person, for a patient who, because of his/her medical condition and disabilities, requires total assistance with toileting and/or walking and/or transferring and/or feeding at unscheduled times during the day and night." 24 hour personal care includes continuous (split-shift or multi-shift) care provided by more than one aide as indicated in 18 NYCRR § 505.14(a)(3). This is to assure the health and well-being of the consumer whose care needs are being met through this service type. It is unreasonable to assume that a single individual can provide safe and adequate assistance without sleep to a consumer 24 hours per day or that a single person can provide substantial amounts of 7 day/week care.

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.

9 Q. Is there a required number of personal care personal assistants for backup?

A. No. The need for and number of additional personal assistants is dependent on a variety of factors and should be determined on a case by case basis. A consumer who only has hours authorized for housekeeping tasks is not likely to be at risk if his/her personal assistant is unavailable for a limited period of time. However, a consumer who is ventilator dependent must have an adequate plan for assuring his/her health and safety in the event that the scheduled personal assistant is unavailable. Additionally, if the district determines at any point in time that the consumer's care needs are not being adequately met, the district must review the consumer's arrangements for meeting authorized service and take any appropriate action deemed necessary.

13. Q. How does an individual or an agency become a CDPAP fiscal intermediary?

A. The initial step in the process is to contact the local department of social services (LDSS) in order to determine whether or not the LDSS wants to pursue a contract/memorandum of understanding (MOU) with the individual or the agency. If the LDSS determines that they wish to pursue a contract/MOU with the entity, they must follow the guidelines delineated in 98 OCC LCM-003. The agency/individual must contact the Bureau of Long Term Care Reimbursement at (518) 473-8910. A Health Provider Network (HPN) account will be established. The agency/individual will access their HPN and complete the required cost report(s) in order to establish rates. If the agency/individual is not already a Medicaid provider, they must also contact the Division of Medical Review and Provider Enrollment at (518) 474-8161 in order for the Department to establish a provider ID number.

14. Q. Is the CDPAP personal assistant free to choose the vendor agency (fiscal intermediary)? Is the consumer able to choose the vendor agency (fiscal intermediary)?

A. Each social services district must contract with a sufficient number of fiscal intermediaries to serve the district's CDPAP consumers. Although neither a CDPAP consumer nor the personal assistant may require that the district contract with a particular fiscal intermediary, districts should be reasonable in the response to requests for a particular fiscal intermediary to be under contract rather than summarily reject such requests across-the-board. There may be circumstances in which the district could reasonably accommodate a request for a particular fiscal intermediary with no detrimental effect on the district's administrative procedures. For example, a CDPAP consumer may request a particular fiscal intermediary because he or she has a long-standing relationship with a personal assistant who is affiliated with that entity. The district should consider whether it can accommodate this or other reasonable requests. Districts should thus evaluate requests for a particular fiscal intermediary to be under contract to the LDSS on a case-by-case basis.

The purpose of Local Commissioner's Memorandum 06 OMM/LCM-02, dated November 2, 2006, is to transmit to the local social services districts, a second round of answers to questions submitted by local social services districts, fiscal intermediaries and Consumer Directed Personal Assistance Program (CDPAP) consumers regarding the CDPAP. The attached Questions and Answers document will serve as an additional guide for local districts to use in the administration of the CDPAP.

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.

♦ 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.

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.

Civil Practice Law and Rules section 4547 blocks, for most purposes, the introduction into evidence of offers to compromise a claim. 18 NYCRR section 358-5.9 states that "(t)echnical rules of evidence followed by a court of law need not be applied" in a Social Services Law section 22 fair hearing, while apparently not foreclosing the application of such rules at all times.

Regulation 358-5.9(a) provides:

> At a fair hearing concerning the denial of an application for or the adequacy of public assistance, medical assistance, HEAP, food stamp 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. Except where otherwise established by law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of public assistance, medical assistance, food stamp benefits or services, the social services agency must establish that its actions were correct.

DISCUSSION

The MLTC Plan denied, outright, Appellant's physician's prior approval request for LPN Services in the home. Appellant exhausted her internal remedies within the Plan, giving her the right to have the Plan's determination(s) reviewed at the present fair hearing. See Volume 42 of the Code of Federal Regulations, Part 438.

Medical records placed into evidence at the hearing establish that Appellant suffers from Alzheimer's Disease, cardiac arrhythmia, dependence on respirator and supplemental oxygen, hypertension, gastro-esophageal reflux disease, skin ulcers, being underweight, having previously suffered cardiac arrest, and other ailments. The nurse who performed the UAS-NY report of July 31, 2019 (a now-standard report for Personal Care Services cases) described one of Appellant' ulcer's as a "deep pressure ulcer."

The record establishes that Appellant was hospitalized June 30, 2019 with breathing problems. To be able to release her, the hospital's records state, Appellant had to be "PEGed and trached." That is, the hospital physician's had to give Appellant a tracheotomy, which can be described as making an incision on the anterior aspect of the neck and opening a direct airway through an incision in the trachea, to enable the patient to breath. The physicians also passed a feeding tube (a percutaneous endoscopic gastrostomy, or PEG) into Appellant's stomach so that she could be fed directly, due to problems eating in the normal fashion. Medical records also demonstrate that Appellant has been prescribed supplemental oxygen, which is provided via an Oxygen Machine.

In its Final Adverse Determination to deny Appellant's representatives' application for LPN services for Appellant, the MLTC Plan stressed that Appellant's home was not a safe environment for Appellant given her apparent need for such high levels of care. The MLTC Plan's representative was asked at the hearing, though, whether the MLTC Plan had thought better of continuing to authorize Personal Care Services (which are apparently, it turns out, the Consumer Directed Personal Assistance Services of 18 NYCRR 505.28) to Appellant; the record establishes that the MLTC Plan resumed Appellant's PCS / CDPAS services upon Appellant returning home from the hospital in the Summer of 2019. In response to said questioning, the Plan representative stated that no Notice of Intent to discontinue Appellant's PCS/ CDPAS had issued.

That being the case, official notice is taken here that neither PCS nor CDPAS may be authorized unless by authorizing same the Appellant may be maintained safely in his or her home. This is not taken to be a guarantee of safety, but obviously the authorizing body (here the MLTC Plan) has to have some reasonable expectation that Appellant is in other than dire danger. Given that the MLTC Plan has, through its actions and omissions, effectively given the impression that it believes Appellant can remain home with some degree of safety, given some care in the home, the reasoning employed by the MLTC Plan in denying the application for a prior authorization for LPN Services is rejected, and said determination is not sustained.

The MLTC Plan's comments as to safety do demonstrate that said Plan is aware of the complex care needs of Appellant. By the time of this writing, the Administrative Law Judge has seen at least three Physician's Orders, now of record, stating Appellant's medical need for LPN

Services. Whereas the first Physician's Order came in the form of a letter, a matter concerning which the MLTC Plan made reference at the first session of this hearing, by the second session two more formal "Certification and Plan of Care" documents had been completed (albeit for a one year period rather than the maximum six month period; this should be read as referring to a six month period). The Order from Dr. [redacted] states that the Nurse shall:

> (perform) systems monitoring, ventilator management, administration and management of oxygen, administration of nebulizer treatments, tracheal suctioning as need to maintain airway; tracheostomy and gastrostomy tube care; administration of enteral feeding, maintain skin integrity; wound care; changing of wound dressings; administration of enteral feeding; water flushes; administration of complex medication regimen enterally.

The same physician happened to also order standard Personal Care Services tasks from the LPN. In any event, that physician ordered diaper changes.

In an August 21, 2019, another physician in particular, Doctor [redacted], makes clear he has examined the patient, noting his expertise in wounds and wound care. Unfortunately, this physician, consistent with other physicians' and nurses' findings, writes that Appellant has "several" wounds which need expert care.

As helpful background, it is noted here that the record is quite clear that Appellant requires 24 hours daily care of, at the very least, Personal Care Services aides, with those aides either being CDPAS aides (such that they can perform some nursing tasks without a license), or with family members assisting with skilled tasks, regardless of each family member's status as a formal "aide." The MLTC Plan, as mentioned above, did not seriously argue against authorizing continued Personal Care Services for Appellant. In addition to the skilled tasks of helping Appellant with her tracheostomy, PEG, and Oxygen, Appellant requires a full array of assistance with Level I and Level II Personal Care activities, with toileting being a notable example of a Level II task with which she needs help.

While the MLTC Plan did not position itself well to argue that Appellant cannot be safely maintained at home (the Plan having apparently not actively tried to prevent the discharge home from the hospital, nor having attempted to discontinue the Personal Care Services), Appellant's medical situation does raise concern, and does involve the care of a "trach," a "PEG," and an Oxygen Machine, including administration of oxygen. Wound care, needed by Appellant, is also above even the certified home health aide level of care, in any event, in the present case which involves a deep pressure wound. (As a reminder, "certified home health aide" is the level of trained aide immediately above the "personal care services aide" designation, with more training).

With multiple physician's orders on hand, and with evidence of record of Appellant's medical situation, it may be repeated here that the condition of 18 NYCRR section 505.8 requiring that the care sought by the patient is above that which could be met by CHHA services is met. Upon full review of the record, Appellant's Counsel has established Appellant's medical

need for services of a Licensed Practical Nurse in the Appellant's home. The MLTC Plan's determination to outright deny the prior approval request for LPN Services is not sustained.

The Physician's requests for LPN Services for Appellant have been for the amount of 24 hours daily, 7 days weekly. A close reading of said requests (usually referred to in Fair Hearing Decisions as the doctor's "Orders") reveals, though, that the physicians seem to have contemplated that the nurses would also perform the Personal Care Services functions that Appellant requires in the home. Appellant's attorney contended at the hearing that this is lawful; that may well be so, although that question need not be addressed here, since it is common to authorize Personal Care Services and LPN services at the same time, and coordinate them.

Beyond being common, that constitutes a desirable arrangement, because it provides all needed service in a more economical fashion. While the precise "dollars and cents" amount of proposed care is not determinative of eligibility for different kinds of care under the Medical Assistance Program, it goes without saying that the United States of America and the State of New York are permitted to seek reasonable economies. A strongly implied requirement to do so within a "home care" aspect of the Medical Assistance Program can be found, e.g., at 18 NYCRR section 505.14(b). A cooperative interaction of Appellant's LPN services here with Personal Care Services becomes particularly apt if, as the Plan hints in some of its material, the Appellant's Personal Care Services aides are in fact CDPAS aides, since such aides may (if properly trained) perform nursing tasks, even if lacking a nurse's license. See Local Commissioner's Memorandum 06 OMM/LCM-02.

In summary, not only can most of the Personal Care Services work be performed by a PCS aide, but, to the extent the aide(s) are in fact CDPAS, some of the skilled care can also be performed by the aides. One might note here that, if the aides are not presently adequately trained, they may, conceivably, reach a point of such training in the future.

The MLTC Plan was probably in the best position to create the ultimate balance between home care aide and Licensed Practical Nurse in this case. However, the hearing record made clear that the Plan fought the very notion at every turn. At the August 26, 2019 session of this hearing, the Plan's Representative read from what were said to be [redacted] notes, specifically not submitted into evidence, which, from what was spoken aloud at the hearing, seemed to suggest both that Appellant's problems were too severe to receive LPN Services at home, and that they were not severe enough to warrant such services. This gave the Administrative Law Judge the impression of the Plan exhibiting a stronger resistance to the notion of authorizing LPN services than was apparently warranted by the attendant circumstances.

Given Appellant's severe condition, and need for skilled care on at least four fronts: Trach; PEG; severe wound care; and use of Oxygen Machine, the ruling in this Decision is for an authorization of 16 daily hours of LPN Services, to be authorized in coordination with Personal Care Services and /or Consumer Directed Personal Assistance Services.

It is noted that, if, for example, the ability of CDPAS aides increases, or (non-exclusively) other relevant conditions change, a reduction in LPN hours could be considered. A reasonable duration of the implementation of the present Hearing Decision is presumed in making the preceding comment.

It is noted that Appellant has been coded as homebound within the parameters of the court order in Varshavsky v. Perales. Such homebound Appellant's normally have a right to an additional hearing in the home where, as here, the Decision After Fair Hearing is not fully favorable to the Appellant.

Documents found in the record indicate, however, that Appellant suffers from "severe dementia." A July 24, 2019 UAS-NY report by a registered nurse, which report is in this hearing's record, states as much, and notes that "(m)ember is severely impaired with Alzheimer's..never or rarely makes decisions." In a section of the UAS-NY called "making self understood (expression), the nurse wrote "rarely or never understood."

In the section entitled "ability to understand others (comprehension), the nurse wrote "rarely or never understands." On page 5 of the UAS-NY, near the bottom, the nurse notes in comments that Appellant suffered a "CVA" (cardio-vascular accident, that is, a stroke). On page 11 of the UAS-NY, the nurse states "Member [sic] Alzheimer's has gotten progressively worse." Under these circumstances, scheduling of a home hearing pursuant to the just-named Varshavsky case would be futile, and no home hearing is being scheduled prior to issuance of the present fair hearing decision. Moreover, given these circumstances, Appellant's attorney waived Appellant's right to a home hearing orally at the first hearing session, and, at the second hearing session, signed a written waiver of Appellant's right to a home hearing under Varshavsky v. Perales. Thus, no home hearing will be scheduled with regard to the MLTC Plan's determination to deny an authorization for the specific amount of "24 hours daily" LPN Services for the Appellant.

DECISION AND ORDER

The MLTC Plan's July 2019 determination that Appellant lacked a medical necessity for Licensed Practical Nurse Services in the specific amount of 24 hours daily, 7 days weekly, as requested, was correct.

1. The MLTC Plan is, however, directed to provide Licensed Practical Nurse services to the Appellant in her home, as directed below.

The MLTC Plan's July 2019 determination to completely deny Appellant's physician's prior approval request for Licensed Practical Nurse Services in Appellant's home was not correct and is reversed.

1. The MLTC Plan is directed to authorize Appellant to receive Licensed Practical Nurse Services in Appellant's home in the amount of 16 hours daily, 7 days weekly under a six month authorization, said Nurse Services to be authorized in coordination with Personal Care Services or CDPAS in the Appellant's home.

Should the Plan 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 Plan promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
09/09/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee