

TO: Local District Commissioners, Medicaid Directors

FROM: Cynthia Schaffhausen, Co-Director
Division of Home & Community Based Services
Office of Long Term Care

SUBJECT: Consumer Directed Personal Assistance Program: Clarification of
06 OMM/LCM-1, "Questions and Answers Related to Administration of
the CDPAP"

EFFECTIVE DATE: Immediately

CONTACT PERSON: Leslie Galusha or Priscilla Ferry at 518-474-5271

The purpose of this GIS is to clarify previous guidance regarding social services districts' administration of the Consumer Directed Personal Assistance Program ("CDPAP") as set forth in 06 OMM/LCM-1, entitled "Questions and Answers Related to Administration of the CDPAP", issued on June 30, 2006. This GIS may have implications in the administration of CDPAP to non self-directing individuals.

In particular, this GIS clarifies the Department's response to Question #8 as it appeared in 06 OMM/LCM-1. This question is set forth below, followed by the Department's response at that time:

- "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 the CDPAP. The LDSS must ask the fiscal intermediary how it will fulfill that responsibility." (emphasis added)

This directive clarifies that the Department's response, particularly the bolded language set forth above, should **not** be interpreted as requiring that, in all cases, the "self-directing other" or surrogate who has voluntarily assumed the responsibility to hire/fire, train, supervise and direct a non self-directing consumer's CDPAP personal assistant be present at all times in the home, or other setting in which services are provided, while the personal assistant performs tasks, whether personal care aide, home health aide or nursing tasks, on the non self-directing consumer's plan of care. The directive also provides further guidance to districts regarding the CDPAP assessment process, particularly with respect to non self-directing consumers.

The district's case manager has the primary responsibility for determining whether the consumer is self-directing and capable of performing CDPAP participant obligations. This determination should be based on a review of available information in the physician's order and the social and nursing assessments. The case manager must be sensitive to the consumer's habits, factors in the consumer's physical environment, and relationships with informal caregivers that may impede the consumer's ability to be self-directing and to consistently perform his or her responsibilities. The case manager should also consult, as needed, with the assessing nurse, the local professional director or designee, or protective services for adults staff. The case manager may also obtain a psychiatric evaluation in appropriate cases.

As defined in Department regulation, a "self-directing" individual is capable of making choices about his or her activities of daily living, understanding the impact of the choice and assuming responsibility for the results of the choice. Characteristics of a self-directing consumer may include the following:

- The consumer is alert, demonstrates unimpaired judgment, makes decisions that do not place the consumer or others at risk and is able to manage his or her own affairs;
- The consumer understands what to do in an emergency that threatens his or her health or safety and can summon appropriate assistance, either verbally or with the help of a device; and
- The consumer knows how to obtain assistance during times when CDPAP services are not being provided, including when services are unexpectedly interrupted due to inclement weather or personal assistant illness.

In contrast to a self-directing individual, an individual who is not self-directing lacks the capability to make choices about his or her activities of daily living, does not understand the implications of these choices, and cannot, or does not, assume responsibility for the results of these choices. Characteristics of a non self-directing consumer may include the following:

- The consumer may be delusional, disoriented at times, have periods of agitation, or demonstrate other behavior that is inconsistent or unpredictable;
- The consumer 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 by misusing home appliances or equipment; or
- The consumer may exhibit other behavior harmful to himself or herself or to others, such as hiding medication, taking medication without his or her physician's knowledge, refusing to seek assistance in a medical emergency or leaving cigarettes unattended. The consumer may not understand how to summon assistance in an emergency.

A consumer who is self-directing and who participates in the CDPAP must be capable of hiring/firing, training, supervising and directing his or her personal assistant to perform the particular tasks that are included on the consumer's plan of care. These tasks may include personal care services tasks, home health aide tasks and nursing tasks. The self-directing consumer supervises and directs his or her personal assistant by, among other things, deciding the order and manner in which each specific task identified in the consumer's plan of care is to be performed. Supervision of the personal assistant by a nurse is not required in the CDPAP as training and supervision/direction of the personal assistant is the consumer's responsibility.

A non self-directing individual may be eligible to participate in the CDPAP; provided, however, that an appropriate individual, acting as the consumer's surrogate, is willing, able and available to perform the functions that would otherwise be performed by a self-directing consumer. This requirement is based upon the statute that authorizes the CDPAP for Medicaid recipients. The statute defines an "eligible individual" as including, among other criteria, an individual who "is able and willing or has a legal guardian able and willing to make informed choices or has designated a relative or other adult who is able and willing to assist in making informed choices." [See Social Services Law §365-f(2)(c)] A related statute provides that the CDPAP personal assistant may provide "nursing services" when such services are "under the instruction of a patient or family or household member determined by a registered professional nurse to be self-directing and capable of providing such instructions." [See Education Law § 6908(1)(a) (iii)]

The individual who voluntarily assumes responsibility for performing CDPAP participant functions on behalf of a non self-directing consumer is commonly referred to as the "self-directing other." The individual who serves as the "self directing other" or surrogate for a CDPAP participant should be a legal guardian or a responsible adult acting in a similar fiduciary capacity. This essentially means that the individual owes a duty of care to the CDPAP participant and is expected always to act in his or her best interests. The "self directing other"/surrogate may also be an adult family member, household member or friend whom a registered professional nurse has determined to be self-directing and capable of instructing the personal assistant and performing the CDPAP participant's responsibilities. Neither the fiscal intermediary nor the CDPAP personal assistant may act as the "self-directing other"/surrogate for a CDPAP participant.

The person who serves as the "self-directing other"/surrogate essentially "steps inside the shoes" of the consumer and performs those activities that the consumer would perform, if he or she were self-directing. These activities include hiring and, if necessary, firing personal assistants; training the personal assistant to perform tasks that are included on the consumer's plan of care; scheduling when and how care is to be provided; and, supervising and directing the personal assistant. As the consumer's "self-directing other"/surrogate, this person is also responsible for signing the personal assistant's time sheet, collaborating with the fiscal intermediary in assuring that the consumer remains appropriate for the CDPAP, and participating in the CDPAP assessment process. As with a self-directing consumer, no nursing supervision is needed to determine whether the CDPAP personal assistant is competently and safely performing the tasks included on the consumer's plan of care. This is the responsibility of the "self-directing other" who acts as the consumer's surrogate and who has assumed responsibility for performing all CDPAP consumer responsibilities.

There are various methods by which the "self-directing other"/surrogate may fulfill his or her responsibility to supervise and direct the CDPAP personal assistant to result in a safe plan of care. These include, but are not limited to, continuous or intermittent on-site supervision and direction of the personal assistant; supervision and direction of the personal assistant from a remote site via telephone or other electronic means; or development of an appropriate emergency protocol for the personal assistant to follow should an unexpected change occur in the consumer's medical, mental or environmental condition.

The method that is appropriate depends upon the circumstances of each individual case and is determined by the assessor through discussion with the self directing other during the assessment process. Factors that should be considered include the following:

- whether, based on the consumer's diagnoses, the complexity of the consumer's medical condition, and the specific personal care aide, home health aide or nursing tasks included on the care plan, it is reasonably anticipated that frequent medical or nursing judgment or intervention may be needed to preserve the consumer's health and safety;
- whether, and the extent to which, the consumer, due to age, or physical or mental capacity, is able to communicate his or her needs to the personal assistant;
- whether the "self-directing other"/surrogate who has trained the personal assistant may be able to adequately supervise and direct the assistant from a remote site by telephone or other electronic means; and
- whether the "self-directing other"/surrogate has documented not only the specific tasks with which the consumer needs assistance and that he or she has trained the personal assistant to perform these tasks but also that the assistant has been instructed in what actions to take should a medical emergency occur.

To reiterate, there is **no** requirement that the individual who serves as the "self-directing other" or surrogate for a non self-directing consumer must always be physically present, in each and every case, to supervise and direct the CDPAP personal assistant during the performance of tasks on the non self-directing consumer's plan of care. This individual may fulfill his or her responsibility to supervise and direct the personal assistant by having such contact with the assistant that the district has determined is sufficient to assure, to the extent reasonably possible, a safe care plan. The specific types of contact, whether on-site or via telephone or other means that is appropriate may vary depending upon the specific circumstances of each particular case. The nurse assessor is responsible for developing, in collaboration with the consumer's representative and district case manager, a safe and appropriate plan of care.

The Department has accordingly revised the response to Question #8, as contained in 06 OMM/LCM-1:

- "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 perform. The consumer, or the person who serves as the consumer's "self-directing other"/surrogate is responsible for training the assistant to perform the tasks and for supervising and directing the assistant. Nursing supervision to monitor a CDPAP personal assistant's ability to perform tasks identified in the consumer's plan of care is not required because supervision and direction of the personal assistant is the responsibility of the self-directing consumer or, in the case of a non self-directing consumer, the "self-directing other"/surrogate. Social Services Law § 365-f requires the vendor agency (fiscal intermediary) to monitor the consumer's, or the self-directing other's, continuing ability to fulfill his or her responsibilities in the CDPAP. The LDSS must ask the fiscal intermediary how it will fulfill that responsibility."