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*Consumer Directed Personal Assistance Association of New York State*

**Testimony of the Consumer Directed Personal  
Assistance Association of New York State**

**on**

**2013-2014 State Fiscal Year Executive Budget**

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**Submitted to:**

**The Senate Committee on Finance**

**and**

**The Assembly Committee on Ways and Means**

**Submitted by:**

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## **Consumer Directed Personal Assistance Association of New York State**

Hello Chairman DeFransisco, Chairman Farrell, Chairman Hannon, Chairman Gottfried and all of the Senators and Assembly Members here today. My name is Anthony Caputo, President of the Consumer Directed Personal Assistance Association of New York State, and I appreciate this opportunity to address you today about the impact of the Governor's budget proposal on fiscal intermediaries and consumers running and using consumer directed personal assistance.

Authorized by the Legislature in 1995, Consumer Directed Personal Assistance (CDPA) is a relatively new service in the community based long term care industry; however, in the almost twenty years the program has existed on a statewide basis here in New York, it has seen tremendous growth based on the number of programmatic advantages.

CDPA is different from traditional community based long term care in that it gives primary control of the everyday operation of the service to the consumer instead of an agency. The consumer is responsible for recruiting, hiring, training, supervising, and if necessary, terminating his or her own workers. This level of control provides the consumer with a degree of independence that more traditional models cannot match. The consumer controls when he or she wakes and goes to sleep, when meals are served, when and how tasks are performed and – in the most basic sense – who it is that is authorized to enter their home and touch their body.

In addition to empowering consumers, the model is also much more cost effective. While numerous peer reviewed studies demonstrate that services delivered through the consumer directed personal assistance model are as effective, if not more effective, than traditional agency based care; the service is dramatically less expensive than other forms of community based long term care. For instance, according to Department of Health numbers, CDPA is, on average, \$2.16/hr less expensive than personal care. Because of exemptions in the nurse practice act that allow workers to perform any task from personal care level 1 tasks such as basic homemaking to skilled nursing tasks such as medication administration and wound care.

Such a system is possible because of the high degree of control the consumer has in the delivery of his or her care. The consumer takes responsibility for understanding how tasks should be completed. The consumer also takes responsibility in the event that something goes wrong. Where the nurse or agency would be liable in the event of a failure in the traditional model, consumer directed personal assistance, because of the consumer's lead, places that onus on the consumer.

The programmatic design of CDPA also recognizes that it is impractical for the state to expect most Medicaid consumers to not only run the day to day aspects of their service but to run their business as well. Therefore, fiscal intermediaries (FIs) were created to handle the “backroom” functions of being a manager. FIs take care of legal paperwork, payroll, securing insurance – including worker compensation, unemployment and, in most cases, health. FIs also are responsible for ensuring that the workers get paid. Consumers agree to pay a rate to their workers based on the amount that the FI gets reimbursed from a county or health plan. The consumer submits signed time records to the FI, and the FI pays the worker while waiting for reimbursement from the third party. In this way, the FI also serves as a check, protecting the state and the system against potential fraud by validating time records and performing spot audits based on the level of suspicion with individual consumers and workers.

Because of this dynamic, FIs have competing pressures on them. They must respond to consumers, who want systems simple and easy to follow while meeting state and health plan requirements for record keeping and time record security. They must also seek to balance the desires of consumers, who want their workers paid as much as possible – indeed, consumers will often choose their FI based on the amount that they will be able to reimburse their workers – with the realities of balancing expenses and revenues.

It is this last struggle that is becoming more difficult now. In November, the state moved CDPA from fee for service Medicaid to managed care and began the transition of dual eligible recipients – those in both Medicaid and Medicare – to managed long term care. CDPAANYS embraced this transition, as it will end years of inconsistent rules and interpretations from different counties as every county operated their CDPA program slightly differently, or at times, dramatically differently. However, as the shift becomes reality, some changes are proving more difficult than others.

We must commend the Department of Health for their efforts here. Jason Helgerson and his staff have worked diligently to help ensure that the plans implement CDPA in a manner that honors the unique nature of the model and establishes the level of consistency we have long sought. However, despite that, concerns remain, particularly surrounding FIs ability to continue to provide reimbursement to workers at a level that will allow consumers to attract and retain workers.

The Governor proposes to require a living wage for all nursing homes workers throughout the state. As part of this, he proposes to require all contracts between nursing homes and health plans to allow for adequate compensation to ensure the retention of a high quality and qualified workforce. CDPAANYS reserves judgment on the living wage provisions for nursing home employees, since this is not directly related to the provision of CDPA; however, **we strongly endorse provisions that require services to be adequately reimbursed by the health plans and propose that this provision be expanded.**

FIs and consumers are concerned about their ability to continue to attract and retain a high quality workforce. For, while the home care industry historically has a high turnover rate, with

home health aides in New York City experiencing an annual turnover rate of 40-60%<sup>1</sup>, once consumers identify a worker that they can work well with, relationships will often last 20-30 years. At my FI, Concepts of Independence, which served as the model for the state law, we have begun to pay pensions for workers' who have retired after over 30 years of work. This consistency accounts for the high level of care that consumers can receive in CDPA, and the high success of the model.

However, as managed care is introduced, downward pressure will be exerted on salaries. Workers in the "living wage counties" of Nassau, New York City, Suffolk and Westchester stand to be most affected. Two years ago, when the Legislature first implemented mandatory managed care and managed long term care, it took the step of enacting wage parity provisions for home care and personal care workers in these counties. Personal assistants in CDPA were not included in the wage parity provisions. However, because FIs contracted with the counties, workers have historically benefitted from the local living wage statutes.

We have already begun to see a dramatic shift in the marketplace, as more agencies look to become FIs. All it will take is one unscrupulous FI that is willing to reimburse minimum wage or slightly above to secure contracts with managed care plans and force the industry into a "race to the bottom" for worker salaries. FIs who have historically reimbursed consumer's workers well will be forced to dramatically reduce their reimbursements or lose their contracts. Without any protections in place, workers in Nassau County, who have been receiving over \$14/hr, will likely see their wages reduced by almost \$5. I challenge anyone here to reduce what they live on by 65% of the salary you are receiving today. It is not possible, especially if you were part of a relatively low wage workforce already.

This reduction in salaries will come as the remainder of the long-term care workforce in these counties sees their wages protected. The workforce for consumers will see that they can work for an agency and earn significantly more money, often for doing less arduous work, since there will not be the added home care and nursing tasks involved. Consumers will face increased difficulty attracting high quality workers. The workers they can attract will be likely to leave as soon as they can secure employment at an agency. This will seriously disrupt the viability of CDPA as an option for consumers, as a model that cannot attract workers cannot sustain itself.

**Therefore, I stand before you today asking you to extend the wage parity provisions to CDPA, ensuring workers have the basic salary protections as the rest of the industry and protecting consumers and workers.**

Wage parity provisions are not enough by themselves. FIs and all other providers deserve the same protections that are being offered the nursing home industry, namely, the legal protection that contracts must provide compensation that is sufficient to attract and retain a high quality workforce. **Therefore, CDPAANYS strongly recommends that language requiring compensation from plans be adequate to guarantee a high quality workforce be incorporated into the wage parity law as well.**

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<sup>1</sup> Paraprofessional Healthcare Institute. *State Health Facts: New York City's Homecare Workforce*. December, 2010. Viewed on January 28, 2013. <http://phinational.org/sites/phinational.org/files/clearinghouse/PHI-StateFacts-NYC.pdf>

While adequate reimbursement is critical to the ongoing success of CDPA, timely reimbursement is also critical. Fiscal intermediaries are generally small organizations that have small overhead and high direct care costs. There are not large quantities of reserves, and the fiscal stability of the organization relies on prompt reimbursement for the consumer's workers' salaries that are paid.

Over the years, the Legislature has seen fit to protect providers from unnecessary delays in insurance company reimbursement through the passage of "prompt pay" laws that set clear requirements on not only the submission of claims, but the length of time that insurance companies have to pay those claims.

Because CDPA has always been solely a Medicaid Fee For Service program, it was never given a thought when prompt-pay laws were discussed. There is not private pay CDPA service. There is no CDPA service delivered through Medicare. There is no CDPA service delivered through private health insurance. Because of this, the program has never needed protection under "prompt pay" laws. FIs receive time records and paid workers on behalf of consumers. They then sent claims to Medicaid who issued a check.

It is now necessary for us to request such inclusion. We cannot exist in managed care and managed long term care without standing on the same legal ground that every other entity does. While our claims do not necessarily rise to the dollar level that a major medical center, or even a small community hospital, does, they are significant. Without legal protections, we are not protected in the event that a health plan is forced to declare bankruptcy. When establishing payments, courts will look to those entities a plan is forced to pay under law. When a plan is looking to determine who to pay first, it will always look to those for whom it will be fined if payments are not issued.

The truth is, we have already seen these problems begin to emerge. The transition to managed care led to a period of time where FIs went over 75 days without payment. Several FIs were impacted to the point where their ability to meet payroll was threatened. Ultimately, the Department of Health intervened to secure payment, and for that we are grateful. Their efforts did produce movement. However, an industry cannot work when it needs to pursue payment through the Department of Health. Creditors will not accept such a methodology and FIs cannot continually wait until there is a crisis where their ability to meet payroll is threatened to pursue action from the Department of Health.

This is particularly true since this level of chaos ensued with the transfer of approximately 10-15% of consumers through the mainstream managed care system. The system disruption that will occur if the same level of dysfunction transpires for managed long term care, which is 75-80% of most FIs consumer base, will result in the large scale disruption of services and

For the shift to Medicaid Managed Care and Managed Long Term Care to be successful, all organizations must exist on an equal playing field in front of the managed care companies. **Therefore, in order to guarantee the success of this initiative, we strongly request that FIs operating in CDPA be afforded the same legal protections as all others in 3224-a and 3224-b of the Insurance Law.**

And it cannot be argued that there will be questions about the fiscal solvency of some managed long term care organizations. Historically, there have been few such programs, and they have existed almost exclusively in New York City. The dramatic explosion in the number of plans has led to countless new plans that have little to no history. Now, the Governor proposes to eliminate the cap on 75 plans around the state. The burden on both consumers and providers of this growth is difficult. Consumers are trying to make decisions about which plan to choose when a large number of the plans have no history. Providers are trying to contract with plans that themselves do not have all of their internal systems in place.

CDPAANYS recognizes the need to allow for growth in the marketplace; however, the system must have checks in place. Only seven more counties are scheduled to enter mandatory managed long term care before the next State Fiscal Year. There is no need for a dramatic expansion of MLTCs at this point in time. **Therefore, CDPAANYS urges the Legislature to leave the cap on the number of MLTCs in place until the system can absorb the current influx of new plans.**

CDPAANYS would also like to draw the Committee's attention to one critical matter that would be outside of our control, but would dramatically impact our ability to survive without corresponding action from Medicaid. As is evident from the our request that we be incorporated into wage parity laws, CDPAANYS members try to pay personal assistants as much as possible. However, with Medicaid as our only source of revenue, we are limited by the amount counties or plans will reimburse in what we receive.

All of our workers receive well over the minimum wage; however, the overtime rules for home care workers and personal assistants in CDPA are based not on time and a half from salary, but time and a half from minimum wage. An increase in the minimum wage will increase workers overtime rates to levels above what their current salary is. While we would welcome this change, it is unsustainable without a corresponding rate change from Medicaid. **If a minimum wage rate change is to occur, the Medicaid system must accommodate this and add a surcharge to their reimbursement.** Otherwise, providers in the system, who operate on a two year lag from current costs already, will not be able to sustain the difference.

As consumer's transition managed long term care, there will be a strong need for consumer's to have resources available for individual and systemic advocacy. That is why CDPAANYS strongly supports Governor Cuomo's proposal to fund an Ombudsman Program as part of this year's budget. This program will help managed long term care enrollees understand their rights as they undergo a dramatic change in the way in which they receive services. The ombudsman will aid in the resolution of disputes with managed care entities. It will also serve as a critical resource for consumers in identifying, monitoring, documenting and investigating systemic problems such as inadequate information to consumers about their options. The ombuds will be able to offer information, guidance, and support to consumers as they navigate a transition that is likely to be very confusing, especially as the number of managed long term care plans continues to proliferate. Finally, the ombuds will provide direct representation in grievances, Fair Hearings, and appeals. **With the roll out of mandatory Managed Long Term Care already underway, we support implementation of this ombuds program as soon as possible.**

However, as helpful as an ombuds will be for consumers, we share the concerns of many organizations when it comes to consumers rights under managed long term care. In the past, consumers have had a right to “aid continuing” when changes that will negatively affect the number of hours or type of services they are entitled to are proposed. This aid continuing afforded consumers the ability to continue to receive services in the manner and at the level they did before. In the long term care system, these protections are vital because, if services are appropriate, an interruption while the consumer awaits his or her fair hearing could very well make the fair hearing results meaningless. An interruption in care could mean a nursing home.

As the transition to managed long term care is taking place, the state has taken a position that aid continuing will only apply for the first authorization the plan makes – that which takes place within 60 days from when the individual is transitioned to managed long term care. Further, fair hearing rights will only apply after an individual has exhausted his or her internal and external appeal rights through the plan. The combination of these decisions has strong implications for consumers as they seek to navigate the new system. Consumers will be forced to progress through a complex series of appeals that could add critical time to the resumption of services. For consumers in the community based long term care system, this time does not exist. The delays in their service will mean hospitalization, institutionalization and a possible life-long loss of independence.

**CDPAANYS stands with other advocates in urging the Legislature to actively intervene and strengthen consumer rights by ensuring access to aid continuing and a right to fair hearings as a first resort, not a last resort.**

The Governor’s budget also takes steps to put in place provisions for several demonstration programs that have been in development. The Fully Integrated Duals Advantage program, or FIDA, is a complex program that will eventually seek to merge all of the health care needs of consumers in Medicaid and Medicare into one system. The Department of Health has been very open to input from community stakeholders as it has developed the proposal, and we thank them for that. However, there are some provisions in the budget proposal that do concern us. The language in the Governor’s proposed budget would allow for “up to” three managed long term care plans to be authorized without a competitive bid, and would allow the Commissioner to waive any regulations necessary to implement the demonstration for individuals with developmental disabilities.

This, in practice, would allow the Department to authorize one hand-picked plan to function with little to no oversight from the Legislature. **To protect consumers enrolling in these demonstration programs, CDPAANYS urges the Legislature to mandate the creation of three FIDA plans based upon a Request For Proposal process that is open to all bidders.**

**Further, any laws that need to be changed should be addressed as part of the budget process, and regulations should not be exempted unless through the State Register and the process in place that allows the public to provide comment.**

Because of the nature of CDPA, CDPAANYS has a long history of ensuring strong consumer protections. We also have a long history with the nurse practice act, because of the program’s

exemption allowing personal assistants to do skilled nursing tasks. We have always paid very close attention to this language. As previously noted, the exemption works within the confines of consumer directed personal assistance because consumers are self-directing and in charge of training the worker and supervising all aspects of their care.

An exemption becomes much trickier in the traditional models, because the agency is supervising care, not the consumer. Therefore, the supervising nurse is not there to oversee the worker, and a potential error cannot be addressed before it happens.

CDPAANYS does not think it is impossible to confront these challenges. As part of the Medicaid Redesign Team's Workforce Flexibility and Change of Scope of Practice Work Group, CDPAANYS played a role in crafting the proposal's that would create an Advanced Home Health Aide who would be able to do those nursing tasks currently allowed under "special circumstances" for individual self-directing consumers in traditional programs. It would further allow the same advanced aides to administer medications to self-directing and non-self-directing consumers as long as the medications were pre-packaged and/or pre-measured.

The Governor's budget proposal contains language that we assume is based off of these recommendations; however, it is not specific enough to reflect the carefully crafted provisions from the MRT Work Group that allowed us to support the measure. The language inserted in the budget would allow an advanced aide to perform nursing tasks on any self-directing individual, not merely those who the aide had experience. The language would also not limit the nursing tasks that an advanced home health aide could perform to those "special circumstances" already defined.

The Medicaid Redesign Team's proposal was meant to bring clarity and additional qualifications to a set of exemptions already in use because a lack of both was leading to the exemption rarely being used. Further, it would allow home health aides assigned these tasks the opportunity to grow professionally. **CDPAANYS had no problem supporting such a proposal in the Work Group, and we strongly urge the Legislature to work with the Governor and the Department to provide further clarification to the language included in the budget to ensure that it accomplishes the goals of the Work Group while protecting patients.** CDPAANYS does not feel that the language, as proposed, accomplishes this and we would have to oppose the change in its current form.

There are numerous other provisions in the budget that CDPAANYS will be monitoring, and we are still digesting the implications of some provisions of which we are not sure of the impact. This testimony highlights the major provisions we find ourselves concerned with at this point in time and we thank you for this opportunity and your attention.

I am available now, or at any time, if you have any questions.

## **Summary of Consumer Directed Personal Assistance Association of New York State (CDPAANYS) Budget Recommendations**

- CDPAANYS strongly endorses proposals that require services to be adequately reimbursed by health plans but notes they should be expanded to include all long term care providers.
- CDPAANYS asks that the wage parity provisions be extended to include CDPA, ensuring workers have the basic salary protections as the rest of the industry and protecting consumers and workers.
- CDPAANYS strongly recommends that language requiring compensation from plans be adequate to guarantee a high quality workforce be incorporated into the wage parity law.
- CDPAANYS strongly requests that FIs operating in CDPA be afforded the same legal protections as all others in 3224-a and 3224-b of the Insurance Law.
- CDPAANYS urges the Legislature to leave the cap on the number of MLTCs in place until the system can absorb the current influx of new plans.
- CDPAANYS urges an adjustment to the Medicaid rate if a minimum wage increase is to occur so that Medicaid providers like fiscal intermediaries can accommodate the change.
- CDPAANYS strongly supports the creation of an ombuds program as soon as possible, as proposed in Governor Cuomo's Executive budget.
- CDPAANYS stands with other advocates in urging the Legislature to actively intervene and strengthen consumer rights by ensuring access to aid continuing and a right to fair hearings as a first resort, not a last resort.
- To protect consumers enrolling in demonstration programs, CDPAANYS urges the Legislature to mandate the creation of three

FIDA plans based upon a Request For Proposal process that is open to all bidders.

- CDPAANYS urges the Legislature to require the Department of Health to go through the Legislature or the State Register to amend any laws or regulations that need to be changed to allow the public to provide comment.
- CDPAANYS strongly urges the Legislature to work with the Governor and the Department to provide further clarification to the nurse practice act exemption language included in the budget to ensure that it accomplishes the goals of the Medicaid Redesign Team Work Group while still protecting patients.