NEW YORK STATE OF OPPORTUNITY. Department of Health

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TO: Medicaid Managed Care Organizations
Local Departments of Social Services
Plan and Provider Associations
Interested Parties

FROM: Susan Montgomery, Director
Division of Long Term Care, OHIP

SUBJECT: Implementation Date of Additional PCS/CDPAS Regulatory Changes

In a letter sent and posted on November 1, 2021, the Department of Health (Department) provided information on personal care and consumer directed personal assistance services (PCS/CDPAS) regulatory amendments that would go into effect on November 8, 2021. The Department is, in this letter, providing direction on the implementation timeline for additional regulatory changes to 18 NYCRR §§ 505.14 and 505.28 that will take effect on May 1, 2022.

The notice of adoption for the final regulations was published in the New York State Register on September 8, 2021 and gave the Department the ability to delay the effective date of certain provisions both to ensure adherence to federal requirements and ensure an appropriate implementation of the required changes.

Accordingly, the regulatory provisions outlined herein are divided into two categories:

- those that take effect on May 1, 2022 only to the extent that they are being implemented for the **initial** assessment process for adults 18 and over, and
- those that continue to be pended, to be effective at a later date (after May 1, 2022). The Department will issue additional direction to announce the later effective date(s) and provide the implementation timeline for changes in this category, providing at least sixty (60) days prior written notice of these changes taking effect, when possible.

The "initial assessment process" is defined as the community health assessment, medical exam and practitioner's order, and, where applicable, the independent review process conducted by the New York Independent Assessor through contract between the Department of Health and Maximus Health Services, Inc., for those individuals newly seeking PCS/CDPAS and/or MLTC eligibility.

The independent assessment process for routine and non-routine reassessments for adults 18 and over, as well as the independent assessment process for children 4-17, for both initial assessments and reassessments, will be implemented at dates still to be determined.

This letter is also posted to the Department's MRT II website here under Long Term Care. Please direct any questions on the information provided below to independent.assessor@health.ny.gov.

REGULATORY AMENDMENT PROVISIONS IN EFFECT ON MAY 1, 2022, ONLY TO THE EXTENT TO IMPLEMENT THE NEW YORK INDEPENDENT ASSESSOR FOR THE INITIAL ASSESSMENT PROCESS FOR ADULTS 18 AND OVER

Section 505.14(a)(1): Amended to align the "personal care services" definition with statutory requirements that such services be ordered by a qualified and independent practitioner, and not the individual's attending physician.

Section 505.14(b)(1) and the opening paragraph of section 505.28(d): Added to provide an overview of the assessment process, which includes an independent assessment, a medical examination and practitioner order, an evaluation of the need and cost-effectiveness of services, the development of the plan of care, and, when required, an additional independent medical review for high needs cases. The paragraph further provides for how portions of the process may be conducted through telehealth modalities.

Sections 505.14(b)(2)(i) and 505.28(d)(1): Added to describe the independent assessment which is performed by an independent assessor as opposed to the LDSS or MMCO. The independent assessment contains most of the elements of the current social and nursing assessments. Other portions of the current social and nursing assessments have either become unnecessary or remain the responsibility of the LDSS or MMCO to perform. For example, the nursing assessment requirements to review the practitioner order and document the primary diagnosis code have become moot because, under the proposed regulation, the medical examination that leads to a practitioner order will occur after the independent assessment.

Sections 505.14(b)(2)(ii) and 505.28(d)(2): Added to describe the independent medical examination and practitioner order. Most of the examination and practitioner order requirements remain the same, such as the licensure, documentation, and practitioner signature requirements. However, the medical professionals who perform the examination and sign the practitioner order must be employed by or contracted with an entity designated by the Department of Health. Consequently, the 30-day deadline for the order to be provided after the examination has been eliminated. Also, as required by statute, the medical professionals who perform the examination and sign the practitioner order must be independent, meaning that they must not have a prior established provider-patient relationship with the individual.

Sections 505.14(b)(2)(iii) and 505.28(d)(3): Added to describe the LDSS or MMCO responsibilities related to the assessment process. The LDSS or MMCO remain responsible for significant portions of the current assessment process requirements, including a) the review of other available services and supports to determine cost-effectiveness, b) determining frequency of nursing supervision, c) determining the individual's preferences and social and cultural considerations for the receipt of care; d) heightened documentation requirements for 24-hour cases, and e) the development of the plan of care. In addition, before developing a plan of care or authorizing services, the LDSS or MMCO must review the independent assessment and practitioner order by the independent assessor and independent medical professional. Also, prior to authorizing more than 12 hours of services per day on average, the LDSS or MMCO must refer the case to the independent review panel, for an additional independent medical review of the individual and plan of care, and must consider the recommendation of the independent review panel when finalizing the plan of care and in its decision to authorize such services.

Sections 505.14(b)(2)(iv) and 505.28(d)(4): Added to require the LDSS or MMCO to coordinate with the entity or entities providing independent assessment and practitioner

services. These sections also describe the process for resolving mistakes and clinical disagreements in the assessment process, as well as sanctions for failure to cooperate and abuse of the resolution process.

Sections 505.14(b)(2)(v) and 505.28(d)(5): Added to describe the revised independent medical review process. Under the revised process, an independent medical review must be obtained when the LDSS or MMCO proposes to authorize more than 12 hours of services per day on average. The review is performed by an independent panel of medical professionals and coordinated by a lead physician. The lead physician cannot be the practitioner who was involved in the initial examination or practitioner order. The lead physician, or another member of the panel, may evaluate the individual, consult with other providers and individuals, and obtain other medical records that may be relevant to the panel's recommendation. When the independent medical review is complete, the lead physician shall produce a report to the LDSS or MMCO providing the panel's recommendation on whether the plan of care is reasonable and appropriate to maintain the individual's health and safety in his or her home. The recommendation may not include a specific amount or change in amount of services.

Sections 505.14(b)(3)(i) and 505.28(g)(1): Added to require the independent assessment and practitioner order processes to be completed at least annually and in sufficient time to allow LDSSs and MMCOs to, when needed, comply with all applicable federal and state time frames for notice and determination of services.

Sections 505.14(b)(3)(ii) and 505.28(g)(2): Added to require that all determinations by the LDSS must be made with reasonable promptness, not to exceed seven business days after receipt of both the independent assessment and practitioner order, or the independent review panel recommendation if applicable, except as provided under the immediate need process.

Sections 505.14(b)(3)(iii) and 505.28(g)(3): Added to provide that MMCOs must make a determination and provide notice to current enrollees within the timeframes provided in their contract with the Department of Health, or as otherwise required by Federal or state statute or regulation.

Sections 505.14(b)(4)(i) and (b)(4)(ii) and 505.28(e)(1)(i) and (e)(1)(ii): Added to provide that an individual's eligibility for services must be established prior to authorization, and that authorization must occur prior to the provision of services.

Sections 505.14(b)(4)(iii) and 505.28(e)(1)(iii): Added to provide that the authorization and reauthorization of services must be based on and reflect the assessment process and any exceptions to that process applicable to reauthorizations.

Sections 505.14(b)(4)(vi) and 505.28(e)(4): Added to require the LDSS or MMCO to consider the recommendation of the independent review panel prior to authorizing more than 12 hours of services.

Sections 505.14(b)(6) and (7) and 505.28(l): Amended to align the immediate need process with the new assessment process. An individual must first provide to the LDSS a statement of need for personal care services from a physician with direct knowledge of the applicant's condition and an attestation of immediate need, before the individual is considered to have an immediate need.

Section 505.14(g)(3), (g)(4), and (g)(5): Amended to remove from case management

responsibilities related to the coordination and performance of the practitioner order and the social and nursing assessments, and align requirements with the new assessment process.

Section 505.14(f)(3)(vi): Amended to remove references to the nursing assessment and clarify that the LDSS and MMCO are responsible for determining nursing supervision frequency.

Section 505.28(b)(1): Added to provide a definition of "activity of daily living" to align with State law.

REGULATORY AMENDMENT PROVISIONS PENDED FOR A LATER EFFECTIVE DATE (AFTER MAY 1, 2022) – DATE(S) TO BE ANNOUNCED

Any provision cited below is pended until further direction from the Department, including but not necessarily limited to the following:

Sections 505.14(a)(3)(iv), (a)(9) and 505.28(b)(1), (b)(14), (c)(8): Added to update the scope and needs requirements for PCS and CDPAS. Consistent with statutory requirements, recipients would need to demonstrate a minimum need for assistance with activities of daily living (ADL) before such services may be authorized. Specifically, individuals with dementia or Alzheimer's must need at least supervision with more than one ADL, and all others must need at least limited assistance with physical maneuvering with more than two ADLs.

Section 505.14(b)(2)(i)*(b)(1)*, (b)(4)(i) and 505.28(d)(1)(2)(a), (e)(1)(i): These provisions are pended only to the extent that they require the independent assessor to assess for and determine minimum needs criteria.

Sections 505.14(b)(4)(xi), (b)(4)(xii), and (b)(4)(vii) and 505.28(f)(1)(i), (f)(2), and (e)(5): Amended to clarify and align the required reassessment procedures when reauthorizing services under the new assessment process.

Section 505.28(b)(8): Amended definition of "fiscal intermediary" to mean an entity with a contract with the New York State Department of Health.

Section 505.14(c): Amended to remove the requirement for LDSSs to maintain contracts for the provision of nursing services.

Section 505.28(j)(1)(vii): Amended fiscal intermediary responsibilities to repeal requirement that fiscal intermediaries enter into contracts with LDSS and replace with requirement that a fiscal intermediary enter into contract with the Department of Health and into administrative agreements with MMCOs.

Please note, on November 8, 2021, Sections 505.14(b)(8) and 505.28(m) went into effect allowing the Department to permit the current assessment process to continue until such time as the independent assessment and practitioner services are established at capacity. Accordingly, the Department reserves the right to further pend any or all the provisions listed above going into effect on May 1, 2022 if it deems such action necessary. If such an action is taken, all parties will be notified as soon as is practicable.