Chinese-American
Planning Council, Inc.

**Chinese-American Planning Council Home Attendant Program, Inc.**
**Testimony at Department of Labor**
**July 11th, 2018**

**Hearing on Meal and Sleep Time Regulations**

*The Chinese-American Planning Council Home Attendant Program, Inc. (CPCHAP).*

The Chinese-American Planning Council Home Attendant Program, Inc. (CPCHAP) is one of the largest not-for-profit home care service agencies in New York City, licensed in 1998 by the NYS Department of Health as a Home Care Service Agency. Under contract with the New York City Human Resources Administration from the outset, CPCHAP also contracts with many managed care organizations for the provision of Personal Care Services and Consumer Directed Personal Assistance Program to Medicaid-eligible individuals. CPCHAP serves about 3000 home care recipients daily and employs over 4,000 employees.

CPCHAP is well-respected for its ability to provide culturally and linguistically competent home care services for individuals who live in one of the five boroughs of New York City and who are medically disabled, elderly and/or physically disabled who might otherwise require institutionalization. CPCHAP works with clients, their families, nurses, social workers and physicians in tailoring each plan of care and provides services for individuals who speak Chinese, Spanish, English, Russian, and Korean, as well as other languages. CPCHAP works with patients and their families to offer the care needed, ranging from a few hours each week to 24-hour care.

CPCHAP is an inclusive place with clients and employees from various ethnic, linguistic, cultural, religious, or racial backgrounds. We value and are welcoming of one another's views or beliefs. Thanks to this philosophy, we have grown steadily over the years with both returning clients and word-of-mouth referrals to other prospective clients.

CPCHAP has grown due to our well deserved reputation for delivering top quality, life enhancing and extending patient care and for providing fair and generous compensation within our means to our home attendants as well as ensuring good, supportive working conditions. CPCHAP fully complies with current DoL regulations by compensating live in attendants for 13 hours where they receive adequate sleep and meal time under DoL standards. We have put adequate mechanisms in place to assure compensation for meal and sleep interruption under DoL regulations, outlined below. CPCHAP would, however, switch in most cases to two 12 hour shifts if the State provided adequate funding to the agencies with which we contract to allow the two shifts, outlined in our testimony below.

*The following testimony and included recommendations outline the urgency for coordinated clarification of regulations that stretches across the NYS Department of Labor (DOL), to NYS Department of Health (DOH) and Managed Care Organizations (MCOs) and the Human Resource Administration (HRA) contracts and labor groups. This coordinated response requires a State government solution to amend formula funding gaps created by any subsequent mandates.*

**Meal and Sleep Time Regulations: Current Practices**

Currently DOL regulations establish that home care aides who work 24-hour shifts for round-the-clock care are at minimum paid for 13 hours of work, with 8 hours discounted for sleep and 3 hours for meals. Home care agencies base their payment models on this regulation because they are limited by HRA & MCO contracts, which follow DOH funding formulas informed by the DOL's minimum regulations. Despite lawsuits claiming 24-hours of pay for round-the-clock care, DOL has clarified the law in favor of the 13 hour rule which excludes three one-hour meal periods and one eight-hour sleep period. It is important to note that DOH is not legally bound to adjust the formula based on DOL regulations, so had DOL not clarified the law or changed regulations at that time, agencies would have been mandated to pay through existing rates, insufficient to cover the full 24 hours.

Nonprofit home care agencies work hard to ensure that the home care aides have adequate space and uninterrupted time for meals and sleep in accordance with DOL regulations. If an aide providing round-the-clock care receives less than 5 hours of uninterrupted sleep, DOL regulations require they are paid the full 24 hours. CPCHAP engages in good faith efforts that document adequate space and appropriate time for meal and sleep periods. CPCHAP aides sign written acknowledgement of rules and procedures that include, taking photos to document proof of adequate sleeping arrangements and reporting mechanisms when aides are unable to receive five (5) hours uninterrupted sleep-time; when interrupted by a call to duty at any time during his/her total eight (8) hours sleep- time; when unable to receive three (3) hours duty-free time for meal times or break periods; or when interrupted by a call to duty at any time during his/her three (3) hours of meal times or break periods.

CPCHAP pursues these practices because we understand that due to the urgent needs of homebound patients, many aides must interrupt their break hours to attend to their care. If those interrupted meal and sleep times are not properly documented, the effective hourly pay of home care aides could be far below minimum wage. By establishing a record of when these periods are interrupted, CPCHAP is able to compensate for actual hours worked.

**Issues Not Addressed by Current Regulations**

CPCHAP continues to abide by DOL regulations, contract requirements, and labor agreements while upholding good faith efforts to document interrupted meal and sleep time. CPCHAP also recognizes the home care field's challenges in separating "on" and "off" duty time during a 24-hour shift.

Though meal and sleep periods are discounted from DOL pay regulations, CPCHAP recognizes that the quality of rest time during those periods can be compromised by the complex issues and care regimens that round-the-clock care and homebound individuals have. Home care aides may find their ability to reach a deep and restful sleep is countermanded by the weight of their on-duty responsibilities to monitor and attend to vulnerable patients. Meal periods are similarly at risk for interruption. Compromised break times affect aides' ability to achieve the rest needed for the stamina and attention required for the remainder of their shift. It is also imperative that aides are compensated during these on-duty periods, a practice that CPCHAP makes every effort to document and reimburse, as outlined above.

Despite these efforts, it is an onerous task for aides to track the exact on/off duty times that they work. For example, in the middle of an aide's sleep period, a patient may interrupt in need water. After returning to off-duty, the patient may very shortly afterward again require the aide's assistance using the restroom and then again, adjusting themself comfortably in bed. These on/off times can be challenging because even when not actively engaged in a responsibility, the aide remains watchful and attentive for subsequent patient needs.

This type of work environment is also unfavorable to aide and patient alike. In 24-hour shifts, home care aides are afforded little personal time to pursue their own interests, attend to their own family, or achieve the much needed

rest from their physically and emotionally intensive work. Given the level of care associated with homebound individuals, patients would be best served by rotational aides who are able to provide true round-the-clock monitoring and care.

Further adding to the complexity are home care agencies who are caught between multiple overlap regulations and agreements that can complicate decisions about when and which aide staff are assigned to cases. Agencies abide by MCO and HRA contract requirements, DOL regulations, and labor agreements with unions while also juggling low reimbursement hours and restrictions from and between Medicaid or Medicare plans. Cost prohibitive financials make tracking coverage for issues like interrupted hours difficult to juggle, which is why adequate rate reimbursement is the key to meeting these payments.

For agencies wishing to explore less complicated options, such as opting for round-the-clock care via two 12-hour shifts, the costs are even less feasible. CPCHAP provides 49,000 live-in days annually -- the cost of providing two 12-hour shifts for these days would reach beyond our available means under existing State reimbursement formulas. In addition to the challenges in covering rotational shift costs, 12-hour shift care may not be feasible for some exceptional patient cases where illness or regimen require consistency and familiarity. Similarly, patients who elect CDPAP for caregivers who are live-in family or close friends, 24-hour care may be the optimal choice. CPCHAP recognizes that our patients employ their CDPAP attendants. We would generally support decisions by them as the employers to engage family or friends as live in attendants. In these instances, potentially interrupted meal and sleep periods still remain an issue.

**Recommendations for Compensation, Work Schedules, and Care Environment**

*To address the above issues, home care agencies need coordinated clarification of regulations that stretches across considerations from DOL, DOH and MCO/HRA contracts, and labor groups. It is again important to note that DOH is not beholden to DOL regulations to establish its funding formulas. For this reason, a coordinated response requires DOL to also pursue a State government solution to amend formula funding gaps created by any subsequent mandates.*

DOL should enforce scheduling of 12-hour rotations, a mandate that would require intervention by the State to adjust funding formulas. In addition, DOL pay standards should cover meal and sleep time to reflect the ongoing attention and duty required during long care shifts, also requiring State intervention so agencies can provide care and staffing at this level.

*The following recommendations assume, if implemented, rates would be adjusted to fund newly mandated changes and that DOL would work with partners in State government to ensure a legislative solution to cover them*.

> <u>Recommendation 1: Establish a schedule standard of 12-hour shifts for round-the-clock 24-hour care</u>
> DOL should mandate that patients requiring 24-hour round-the-clock care be provided with a rotation of aides who work 12-hour shifts. This would remove issues with monitoring sleep, meal, and live-in conditions but would require DOL to work with partners in DOH and across the State to ensure funding formulas are adjusted for additional care outside of the current 13 hour formula.
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> <u>Recommendation 2: Apply “Meal and Sleep Time” to other DOL standards for non-care workday activities</u>
> Currently, DOL requires that care workers are paid for non-care activities, like travel, that occur during the workday. Just as workers should be compensated for travel incurred as part of their shift, DOL should mandate that meal and sleep periods that occur during shifts are also compensated. This again would require the State to impose rises on Medicaid and Medicare-funded home care to cover these hours and DOL should expect to advocate on behalf of agencies and workers to ensure a solution.

Recommendation 3: Allow 24-hour, same-aide shifts *only* in cases that are deemed medically necessary
In exceptional cases, the nature and severity of some illnesses may require continued 24-hour care by the same aide for the sake of continuity and familiarity with the patient. Similarly, patients who opt for Consumer Directed Personal Assistance Programs (CDPAP) may seek care from relatives who already live with the patient. In these instances, DOL should allow 24-hour, same-aide shifts but establish clear mechanisms that:

1. Only allow 24-hour, same-aid shifts in exceptionally rare cases where same-aide care is deemed medically necessary. These cases are likely to be highly exceptional because patients in need of this degree of care are often in need of hospitalization for closer monitoring. DOL and DOH should coordinate these guidelines as well as include milestones for documenting health improvements that indicate a same-aide 24-hour shift is no longer medically necessary, allowing the patient to transition to rotational 12-hour shift care.
2. Following Recommendation #2 and existing practices, in addition to being deemed medically necessary, cases requiring 24-hour, same-aid shifts should document adequate sleep areas in advance of the aide's assignment.
3. A) Create carve-outs for CDPAP aides who are family and close friends, and may already live in the patient's home, while still adhering to Recommendation #2.
   B) Establish additional mechanisms that define CDPAP care, thus eliminating loopholes where patients may elect CDPAP as a means to achieve 24-hour, single-aide care without documenting medical necessity.

**Fallout from Unfunded Mandates & Opportunities for New York State Leadership**

Should the DOL implement any of the above recommendations, it is incumbent on them to also work with State government to fill the funding gaps and potential destabilization they would create. Were agencies to be placed on the hook for full 24-hours of pay or two 12-hour shifts under existing contract rates, many, if not all, would be forced to offload patient cases, reduce worker hours, or close operations altogether.

These unfavorable outcomes affect all stakeholders in the home care field. For patients, it undermines and reduces the availability and choice of care. For agencies, it forces the shuttering of providers, starting with smaller shops who provide much-needed and niche linguistically and culturally competent patient services, further limiting choices and availability for patients. For workers, it further reduces hours that are already difficult to come by and may drive some workers to move from care agencies toward direct client or privately arranged agreements that may be less regulated, less stable, and less structured than agency work and care plans.

For these reasons, DOL must work across State, DOH, and labor stakeholders to clarify regulations and establish standards that both fairly compensate workers *and* provide stability to the industry and the patients it serves. Unlike other industries, home care is highly resistant to future automation and is expected to grow its workforce alongside an aging population. Pay issues are not unique to our state and will not resolve on their own, but New York State does have an opportunity lead the labor market in creating a national model for dignified and fairly compensated home care work.

*CPCHAP appreciates the opportunity to testify and looks forward to working with the Department of Labor on these issues. For further questions or comment on this testimony, please contact Amy Torres, CPC's Director of Policy and Advocacy, atorres@cpc-nyc.org or Carlyn Cowen, CPC's Chief Policy and Public Affairs Officer, ccowen@cpc-nyc.org.*