

***Consumer-Directed
Personal Assistance Services:
Key Operational Issues
for State CD-PAS Programs
Using Intermediary Service Organizations***

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EXECUTIVE SUMMARY

I. Why Has This Study Been Undertaken?

This study was initiated by the Office of the Assistant Secretary for Planning and Evaluation (ASPE) to identify best practices for implementing consumer-directed personal assistance (CD-PAS) programs through the use of various intermediary service organization (ISO) models. Twenty-three state and Medicaid-funded CD-PAS programs that used ISOs in eleven states were examined in the study.

The term *personal assistance services* (PAS) refers to a range of human and mechanical assistance provided to persons with disabilities of any age who require help with routine activities of daily living (ADLs) and health maintenance activities. These services, when provided in non-institutional settings, are also frequently referred to as “home and community-based long-term care.” PAS is the term preferred by persons with disabilities as well as by professionals in the disability and aging fields who advocate consumer-directed PAS models as a means of maximizing the independence and autonomy of persons who need functional assistance from others. Although PAS is broadly defined as including assistive technologies, home modifications, psychosocial rehabilitation, and a host of other specialized products and services oriented to persons with disabilities and chronic conditions, the core service is personal assistance. PAS are typically provided by an unskilled person who is variously referred to as a *personal care assistant (PCA)*, *attendant* or *aide* (Doty, Kasper and Litvak, 1996).

Consumer-directed modes of financing and delivering PAS permit the consumer--as opposed to medical or social work professionals--comparatively greater choice and control over all aspects of service provision including: (1) recruiting, hiring, and training attendants, (2) defining attendants’ duties and work schedules (3) supervising attendants regarding how specific tasks are to be performed, (4) managing the payroll functions, including paying attendants, and (5) disciplining and discharging attendants. CD-PAS programs may be ranked on a continuum as more or less *consumer-directed* to the extent that the programs foster greater choice and control with regard to several of the above mentioned tasks (Doty, Kasper and Litvak, 1996). Consumer-direction is maximized when the consumer purchases his or her PAS with personal resources (unless he or she relinquishes the employer tasks to a provider agency). However, when a third party payor is involved in financing PAS (e.g., private insurance or publicly-funded programs such as Medicaid), certain limitations may be placed on the consumer’s ability to exercise choice and control over his or her PAS.

Advocates of CD-PAS programs argue that persons with disabilities and chronic conditions should be afforded as much independence and autonomy as possible in decisions regarding the types, amounts, and sources of PAS they can access, especially related to

PCA services. But, with choice and control come responsibility and risk for the consumer, as the attendant may be considered the consumer's employee rather than an independent contractor under the IRS and DoL definitions of *domestic servants* (Flanagan, 1994; Gibson, 1992; O'Neil and Nelsestuen, 1993; Sabatino and Litvak, 1995; Szabo, 1993). Moreover, persons with disabilities and chronic conditions vary greatly in their ability and desire to manage their PAS.

A number of states have implemented state and Medicaid-funded CD-PAS programs. The use of public funds raises significant questions related to program and fiscal accountability, regulatory compliance and liability for negligence affecting consumers or attendants which must be addressed. Because of these issues, states have begun to develop a variety of *intermediary service organization (ISO)* models to facilitate the use of CD-PAS programs by persons with disabilities and chronic conditions of all ages and to assist government policymakers in achieving an appropriate balance among the competing goals of: providing appropriate PAS that affords consumers' choice and control, while assuring program and fiscal accountability, regulatory compliance, protection from liability, service quality and consumer health and safety.

An intermediary service organization (ISO) is an entity that acts as an interagent between a CD-PAS program and eligible consumers for purposes of disbursing public funds and assisting consumers in performing tasks associated with the employment of PAS attendants. From the perspective of CD-PAS program, the core tasks of an ISO are: (1) to directly ensure compliance with legal requirements related to employment of PAS attendants and/or (2) to offer supportive services to enable consumer to perform the required employer tasks themselves.

When the ISO performs these tasks directly, it may, for example, calculate Social Security, Medicare (FICA), and federal and state unemployment tax (FUTA/SUTA) and make all appropriate tax filings with regard to the attendant. It may also broker and administer attendants' fringe benefits, if available. On the other hand, an intermediary may simply assist an eligible consumer by offering training in when and how to manage the employment tax and payroll responsibilities. In such cases, the ISO may monitor the consumer's performance of these tasks to ensure that the consumer is complying with all applicable federal and state requirements associated with employing household help such as a PAS attendant.

ISOs may provide administrative/fiscal and supportive services to eligible consumers. Administrative/fiscal services can include: disbursing public funds, withholding and filing employment taxes, brokering benefits, preparing and disbursing payroll checks and processing employment-related documents including the INS Form I-9, the IRS Form W-2, and timesheets. Supportive services can include: training related to hiring, firing and supervising attendants, managing employment taxes and payroll, assisting consumers in

obtaining temporary or emergency “back-up” services, providing peer counseling, conducting and/or assisting consumers with checking attendant references and/or performing criminal background checks, client assessments, and providing case management.

There is no single set of services that an ISO must provide. Rather, the state CD-PAS program agency should design ISOs that can meet the specific federal and state regulatory requirements and the needs of the service population(s). For example, one ISO may focus exclusively on performing administrative/fiscal tasks (e.g., payroll) on behalf of the consumer, whereas another ISO may focus on supportive services, such as training and assistance to enable consumers to perform the employer tasks themselves.

The ISO models examined in this study are the: Fiscal Conduit ISO, IRS Employer Agent Fiscal ISO, Vendor Fiscal ISO, Supportive ISO, Agency with Choice ISO, and the Spectrum ISO.

Prior to this study, little was known of the ISO models currently being used by states’ CD-PAS programs, how well they meet the objectives of the various stakeholders (e.g., CD-PAS program administrators, the IRS and the U.S. Department of Labor, disability advocates, states’ nurse licensing boards, and consumers and their attendants) and whether ISOs actually facilitate the use of CD-PAS and enhance consumers’ choice and control. However, two earlier studies (Flanagan, 1994; Sabatino and Litvak, 1995) recommended that states use ISOs to manage the tax and labor law issues related to CD-PAS, and that states make available supportive services to consumers.

II. What Is The Purpose Of This Report?

This final report provides practical advice to state program administrators regarding the implementation of CD-PAS programs and ISOs. In particular, Chapters III, V, and VI, taken together, constitute an informal manual of advice from which state program administrators can design optimal CD-PAS programs using ISOs which are based on sound, regulatory principles and well-drafted contracts. Overall, this final report assists state program administrators in designing CD-PAS programs with ISOs that:

- comply with applicable federal tax and labor laws;
- make available supportive services that some consumers may want or need; and
- allow for the application and enforcement of any limitation or restrictions on consumer direction that may be required by state laws and regulations.

It should be noted that due to the significant variation in state tax, labor, worker’s compensation and disability insurance law, the focus of this study was on federal Department of Labor (DoL) and Internal Revenue Service (IRS) laws and their effect on CD-PAS programs and ISOs.

III. How Was The Study Conducted?

Twenty three CD-PAS programs in eleven states that used six different models of intermediary service organizations (ISOs) were selected based on a sampling framework that included seven categories. The seven sampling categories were derived from the literature, information gathered from a brief phone survey of state CD-PAS program administrators, and comment received from the study's technical advisory panel (TAP). The eleven states selected for this study were: Georgia, Idaho, Maine, Massachusetts, Michigan, New Hampshire, New York, Pennsylvania, Virginia and Washington State. Semi-structured interview guides were developed and used to interview the key stakeholder groups in each state.

Site visits and telephone interviews were conducted in the eleven study states between December 1, 1995 through August 30, 1996. One hundred fifty-eight interviews were conducted with one hundred eighty-nine respondents in the eleven states. Key stakeholders interviewed included: state CD-PAS program administrators, ISO administrators, executive directors of the states' board of nurses and home health agencies, advocates for the disabled and elderly, consumers and their attendants. Of the one hundred eighty-nine respondents interviewed, forty-one were consumers and twenty-two were attendants.

Meetings and briefings were held with key central office staff at the Internal Revenue Service and Department of Labor to discuss IRS and DoL rules and regulations pertinent to the study.

This final report addresses six policy relevant questions:

- What are the various models of ISOs and how do they operate?
- What are the federal laws and regulations issues that affect the development and operation of ISOs?
- What are the incentives and barriers that affect the development and operation of CD-PAS program with ISOs?
- How do states' nurse practice acts affect the development and operation of CD-PAS programs with or without ISOs?
- How do contracts facilitate the operation of CD-PAS programs that use ISOs?
- How well do the various ISO models facilitate the use of CD-PAS programs for state program administrators and consumers with disabilities and chronic conditions?

IV. What Are The Characteristics Of Consumer-Directed Personal Assistance (CD-PAS) And Intermediary Service Organizations (ISOs)?

Chapter Two describes the characteristics of consumer-directed personal assistance service (CD-PAS) programs and the various intermediary service organization (ISO) models used in the study states. In particular, this Chapter addresses the following questions.

- What are PAS and CD-PAS services?
- Why do public CD-PAS program administrators consider developing these programs and what are their concerns?
- Are personal service attendants independent contractors?
- What are the employer-related tasks associated with CD-PAS?
- What supportive services facilitate the use of CD-PAS?
- What are intermediary service organizations (ISOs) and what are their role in facilitating CD-PAS?

V. Tax, Labor, Workers’s Compensation And Disability Insurance, And Immigration Law Issues Related to CD-PAS Programs

Chapter Three presents an overview of the important federal tax and labor, worker’s compensation, disability insurance and immigration laws that are applicable to CD-PAS programs and sets forth alternative strategies for achieving compliance with such laws and regulations while preserving consumer choice and control. Each issue discussed is followed by best practice recommendations in cases where questions have arisen.

States designing these programs for consumers at all levels of desire and ability to manage their own affairs must find ways of ensuring that participants in the program comply with all applicable laws and regulations, state and federal. Program administrators must identify those consumers who are able to manage these responsibilities effectively and design program options consistent with these high levels of ability. At the same time, administrators must recognize that there may be other consumers who have neither the desire or the ability (in person or through a surrogate) to manage all of the fiscal and administrative tasks inherent in the modern employment relationship. These consumers may still wish to manage all other aspects of the employment relationship while delegating certain employment-related tasks to an intermediary service organization (ISO), which performs these services as the agent of the consumer.

A. Tax Rules Affecting CD-PAS Programs

Most of the tax issues affecting CD-PAS programs arise from federal income tax, social security and unemployment tax laws. Attendants appear to be employees of the

consumer in most CD-PAS arrangements (except where an agency is the legal employer of record, as in the case of “Agency with Choice” ISOs). The level of control and supervision exercised by most consumers makes it difficult, if not impossible, to characterize the attendant as an independent contractor.

Whether the attendant is an independent contractor (unlikely) or an employee, income tax responsibility generally rests with the employee. The consumer-employer is not obliged to withhold income tax for a household employee (unless requested to do so), but the consumer must provide a statement of wages earned (IRS Form W-2) and must distribute notices and pay advance payments of the Earned Income Credit (EIC) to eligible employees.

With regard to employment tax issues, recent modifications to the Social Security Act to raise eligibility thresholds for covered workers and simplify filing requirements for householders have raised questions for consumers who receive assistance from ISOs. These ISOs (state and private vendors) have reported employment taxes on a quarterly basis and have been governed by depositing rules applicable to most other employers. Should such organizations alter their filing practices and procedures? Chapter Three offers best practice suggestions for resolving issues arising from the application of the new amendments to filing procedures previously adhered to by public and private ISOs acting as agents for consumer-employers in CD-PAS programs. Specifically, Chapter Three recommends that ISOs, acting on behalf of CD-PAS consumers:

- File quarterly reports of Social Security and Medicare (FICA) withholding from employee wages using federal Form 941 as advised in IRS Notice 95-18, adhering to the appropriate deposit rules.
- Apply for a separate federal Employer Identification Number (EIN) as directed by IRS Notice 95-18 for use solely in preparing tax filings as agent for CD-PAS consumers.
- Develop strategies to deal with refunds which must be made to any attendant whose earnings do not exceed \$1,000 annually from an individual consumer-employer.
- Alternatively, if the ISO elects to prepare an IRS Schedule H on behalf of a CD-PAS consumer for his or her attendant(s) and not withhold and deposit the employment taxes, the ISO should remind the consumer periodically of the need to set aside monies to satisfy any employment tax liability arising from the employment relationship. In cases where the ISO withholds the necessary employment taxes, it must make sure to follow the appropriate IRS deposit rules and manage any accrued interest accrued appropriately.
- Issue IRS Form W-2 on behalf of the consumer to each attendant receiving wages for services performed by that consumer. List only the wages attributable to that consumer on the IRS Form W-2.
- Include in the total wage for each employee any co-payments made by the consumer.

- Confer frequently with IRS regional and central office personnel on any questions concerning appropriate filing methods, especially for any practice which departs from the methods authorized by IRS Notice 95-18.

B. Department of Labor (DoL) Rules Affecting CD-PAS Programs

Previous studies of labor laws affecting CD-PAS programs have identified a number of important requirements for program administrators to consider and incorporate in the design and rules pertaining to their state and/or Medicaid-funded CD-PAS programs (Flanagan, 1994; Sabatino and Litvak, 1995). This study's analysis is based on the findings and recommendations contained in these studies, updated to include recent communications from tax and labor authorities as well as reports from the fields as to current policies and practices of CD-PAS programs that use ISOs.

Personal care attendants (PCAs) are classified as domestic servants under the Department of Labor's (DoL) Fair Labor Standards Act (FLSA). Chapter Three discusses the federal minimum wage and overtime rules outlined in FLSA as they pertain to domestic servants, two exemptions to these rules as they pertain to *companions* and *live-in* help, the payment of *night attendants* and OSHA related issues.

State CD-PAS program, ISO administrators, and CD-PAS consumers, (particularly those who manage all of the employer-related tasks for their attendants), must be aware of the provisions of the federal Department of Labor's *Fair Labor Standards Act* (FLSA) regarding domestic service employees (including PAS attendants), including the exemptions for *companion* and *live-in* staff and the provision for *night attendants*. Moreover, they must be aware of any additional state DoL rules that differ from the federal rules in order to be in full compliance with state and federal DoL rules related to FLSA. CD-PAS and ISO administrators should also assess the feasibility of using the *companion* and *live-in* exemptions when designing their CD-PAS programs in order to take advantage of any cost efficiencies related to exemptions for these worker categories.

C. State Worker's Compensation and Disability Insurance Laws and Their Effect on CD-PAS Programs

Worker's compensation insurance laws are state laws that establish basic *quid pro quo* programs. Under worker's compensation insurance laws, an employee agrees to relinquish his or her right to sue his or her employer for damages arising from injuries on the job in return for receiving prompt payment of benefits related to medical care and loss of income due to an injury on the job. Each of the 50 states, the District of Columbia, Puerto Rico and the Virgin Islands has a worker's compensation program. However, some states allow small employers an exemption from otherwise applicable worker's compensation law. For example, in Missouri, employers need not pay worker's compensation insurance

benefits if they have fewer than four employees, whereas in New Jersey, an employer of even a single employee must provide worker's compensation insurance benefits.

The number of worker's compensation insurance claims reported by CD-PAS program and ISO administrators in this study was extremely low. For example, only one worker's compensation case was reported in the three states' CD-PAS programs reviewed that used an IRS/EA Fiscal ISO model and one from the nine programs reviewed that used an Agency with Choice ISO model. One reason given was that the majority of attendants had not experienced a work-related injury. Another reason given was that many PCAs did not have the knowledge or the financial resources to file a claim. A third reason given was that the consumer's income and assets were very low, making any efforts to file a claim against the consumer not worthwhile. However, when an Agency with Choice ISO was the employer of record of the PCA, even though few claims were filed, there was considerable apprehension about the potential cost implications of such claims.

Five states -- California, Hawaii, New Jersey, New York and Rhode Island -- and Puerto Rico have statutes establishing state disability insurance programs. Under such laws, employees and, in most cases, employers must pay a special tax to fund the program or pay for private insurance coverage that meets state requirements (Sabatino and Litvak, 1995).

Generally, disability insurance programs are coordinated with a state's worker's compensation and/or unemployment insurance programs, so in most cases, both taxes or premiums are paid at the same time and the particular state statute defines "employer" and "employee." In general, employment paying less than \$1000 in wages in a calendar quarter is exempt from providing disability and/or worker's compensation insurance, although some state's have lower dollar-amount thresholds. For example, in New York, employers of domestic workers in a private home need not pay temporary disability benefits tax unless they have employed one or more workers for forty hours per week for at least four weeks, and at least thirty days in the calendar year.

CD-PAS program and ISO administrators and consumers, (particularly those who manage all of the employer-related tasks related to their attendants), must be aware of any state statutes for worker's compensation and disability insurance and the scope of these statutes in order to make sure the CD-PAS program and its participants are in full compliance with state law. Moreover, where the laws do not apply, CD-PAS program administrators may wish to consider the positive implications of offering such benefits, such as allowing consumers to effectively recruit quality attendants and to avoid any cases where even an inappropriate claim by an attendant may result in the state being considered the attendant's employer by an administrative law judge or even a court of law.

D. Verifying Citizen or Legal Alien Status

Employers, including employers of domestic workers (e.g., personal care attendants), must verify and maintain records (e.g., completed INS Form I-9) showing that each employee hired after November 7, 1986, is a U.S. citizen, a national of the U.S., or a legal alien who is authorized to work in the U.S. (Sabatino and Litvak, 1995).

Failure of an employer to comply with the verification and record keeping requirements can result in fines ranging from \$100 to \$1000 for each violation. Moreover, an employer who hires a person known to be an unauthorized alien can be punished by a fine of \$250 to \$2,000 for the first offense, with higher fines applicable to subsequent offenses, and criminal penalties if convicted of a “pattern or practice” of knowingly hiring illegal aliens (Sabatino and Litvak, 1995).

All of the CD-PAS programs studied were in full compliance with the Immigration Reform and Control Act of 1986 and the regulations regarding the employment verification process. State designing and implementing CD-PAS program, ISO administrators and consumers (particularly those that manage all the employer-related tasks for their attendants) should obtain and become familiar with a copy of the Immigration Reform and Control Act of 1986, Public Law 99-603, 8 USC Section 1324 (1994). Moreover, whoever is responsible for the verification process (e.g., state IRS Employer Agent ISO, Vendor Fiscal ISO, Agency with Choice ISO or Spectrum ISO or consumer) should be able to perform all the necessary verification tasks and have a place to store the related documentation safely for the required amount of time.

VI. The Effect of State Nurse Practice Acts on the Development of CD-PAS Programs

Chapter Four presents an analysis of how state nurse licensing laws (i.e., state nurse practice acts) affect the design and implementation of CD-PAS programs. It also describes how state nurse licensing laws and CD-PAS program regulations overlap and discusses areas of actual and potential conflict. Two methods cited for resolving conflicts (i.e. exemption and delegation) are described, compared and evaluated.

A. Potential Conflicts Between State Licensing Laws and CD-PAS Program Regulations

State laws regulating the profession of nursing were not written with today’s CD-PAS employment relationships in mind. However, they may be construed to apply to tasks performed by unlicensed personnel such as personal care attendants (PCAs). Many CD-PAS programs contain extensive lists of duties which may be performed by PCAs. Some of these duties, particularly those which relate to the maintenance of consumers’ health and

well being, may be seen as falling within the definitions of “nursing” or “nursing practice” contained in all state nurse practice acts. The first part of Chapter Four describes areas of potential conflict between these two areas of state law

B. Exemption and Delegation: Two Ways of Reconciling State Nurse Practice Acts with CD-PAS Program Regulations

CD-PAS program administrators may seek to resolve actual or potential conflicts in at least two basic ways if unable to construe the licensing laws to harmonize with CD-PAS program regulations: (1) Seek a specific *exemption* to the application of nurse practice acts for CD-PAS programs within a state; or (2) work with the State Board of Nurses representatives, consumer advocates and other interested parties to develop workable delegation protocols allowing health maintenance tasks that fall within the statute’s definition of “nursing” or “nursing practice” to be performed by unlicensed personnel through *delegation*. *Delegation* is the process whereby licensed nursing professionals delegate their authority to perform specific tasks to other personnel serving an individual. If the CD-PAS program is *exempt* from the nurse practice limits on allowable tasks, PCAs may perform all health maintenance and health related tasks without formal authorization by a licensed nursing professional.

C. Exemption and Delegation Compared

A specific *exemption* from professional nurse licensing laws (i.e., nurse practice acts) is easy to administer and raises the fewest implementation issues. However, it may not be either feasible or desirable (from an equitable point of view) to obtain a specific *exemption* for CD-PAS attendants if other unlicensed personnel are still subject to the act. If no exemption is available through interpretation or by legislative amendment, *delegation* can work for those few tasks that are clearly within the exclusive province of licensed nurse professionals. CD-PAS program administrators should work closely with all affected parties to ensure that *delegation* protocols affecting unlicensed personnel within a state are designed to facilitate CD-PAS and to meet the goals of consumer-direction and the Independent Living philosophy.

VII. Effective Use of Contracts to Facilitate the Operation of CD-PAS Programs

Well designed CD-PAS programs emphasize both the independence desired by the consumer as well as the responsibilities that go with the increase in independence and authority. Chapter Five examines CD-PAS programs using ISOs, seeking to discover, among other things, whether, and how, contracts apportioning the rights and duties of the ISO, consumer and attendants facilitate these multi-party relationships. This study found

considerable variation in the scope and subject matter of the contracts used in the twenty-three CD-PAS programs reviewed. However, it did appear that the very process of expressing rights, duties, responsibilities and expectations on paper was generally beneficial in helping the parties achieve the balance between consumer-direction and responsibility that worked best for all.

Chapter Five concluded that contracts that clearly spell out the duties, rights, responsibilities and expectations of the parties to these new and evolving relationships facilitate the efficient operation of CD-PAS programs that use ISOs. Although it takes time to draft a good contract, this time well spent can do much to anticipate and avoid future problems. No contract model fits all of the CD-PAS program relationships. However, a number of models can be developed by states to address the various relationships.

VIII. How Well Do Various ISO Models Assist State Program Administrators in Designing and Implementing CD-PAS Programs and Consumers in Using CD-PAS?

Chapter Six discusses the utility of employing various models of intermediary service organizations (ISOs) to improve the delivery of CD-PAS services to persons of all ages with disabilities and chronic conditions. However, no ISO model is optimal for every CD-PAS consumer. This is because, as in the general population, the characteristics of persons with disabilities vary from person to person. The two principal characteristics CD-PAS administrators must focus on when designing CD-PAS programs are the (1) consumer's *desire* and (2) *ability* to perform the wide range of employer-related tasks associated with CD-PAS. This study examined the effectiveness of six ISO models in balancing individual consumers' desire and ability to perform the CD-PAS employer-related tasks independently with the states' desire to provide appropriate PAS to beneficiaries while ensuring regulatory compliance, program accountability, quality PAS and consumer health and safety.

Each ISO model was evaluated in terms of its performance related to specific evaluation criteria. These were access, program and cost efficiency, compliance/accountability, degree of consumer-direction afforded to consumers and level of administrative responsibility for the consumer.

Chapter Six describes the performance of each of the ISO models examined based on the study's six evaluation criteria (i.e., consumer access to CD-PAS, program efficiency, cost efficiency, regulatory compliance and program and fiscal accountability, level of consumer-direction afforded to consumers and level of consumer responsibility). It also includes conclusions and recommendations for optimal design and implementation strategies for CD-PAS program administrators. The following are the conclusions and recommendations made for each ISO model and some that cut across ISO models.

A. Fiscal Conduit ISO

1. Access, Level of Consumer-Direction and Responsibility

Fiscal Conduit ISOs offer consumers the highest level of consumer-direction and control. However, this ISO model tends to limit access to CD-PAS to consumers who are self-directing and who exhibit a high level of desire and ability to perform the employer-related responsibilities. The availability of effective consumer-employer skills training for consumers and their surrogates, when applicable, will increase consumer access to a certain extent.

2. Program and Cost Efficiency, Compliance and Accountability

CD-PAS programs that use Fiscal Conduit ISOs can significantly limit the state's administrative efforts related to operating the program. Moreover, if a state negotiates the Fiscal Conduit ISO's contract and fees effectively, this model can be a very cost effective one for a state.

Regulatory compliance can vary significantly with this ISO model since the consumer, as the employer of record, is responsible for complying with all employer mandates. Program and fiscal accountability can also be variable since the state has the least amount of control over the administration of the CD-PAS program under this ISO model.

Conclusions and Recommendations Regarding Fiscal Conduit ISOs

Fiscal Conduit ISOs work "best" when (1) participating consumers have a high level of desire and ability, (2) consumer-employer training is made available to consumers, and (3) when there are strong oversight policies and procedures in place to monitor consumer compliance with employer mandates and program regulations, and to assure that Fiscal Conduit ISOs remain faithful to consumer-directed principles and the Independent Living philosophy.

B. IRS Employer Agent Fiscal ISO

1. Access, Level of Consumer-Direction and Responsibility

The IRS Employer Agent Fiscal ISO offers consumers a high level of consumer-direction and control and greater access to the CD-PAS program than is afforded by the Fiscal Conduit ISO. Even though the consumer is the legal employer of record of his or her attendant(s), this ISO model reduces the consumer's employer-related responsibilities by managing the payroll function (managing employment taxes, benefits where appropriate, and preparing and disbursing payroll checks) for the consumer.

2. Program and Cost Efficiency, Compliance and Accountability

Under the IRS Employer Agent Fiscal ISO model, the state has a significant amount of control over the administration of the program. However, this model may not lead to significant program efficiencies since the state may have to establish dual financial and accounting systems in order to manage the fiscal agent functions effectively (e.g., one system for the CD-PAS attendants and one for the general state employee population). This model may not be the most cost efficient ISO model for states since they may have difficulties achieving cost efficiencies using existing state personnel and systems.

The IRS Employer Agent Fiscal ISO model affords states a high level of compliance with employer mandates, a high level of program and fiscal accountability (due to the fact that the state itself is performing the payroll function for consumers) and allows states to retain significant control over the operation of the CD-PAS program. However, attendants often erroneously consider the state to be their employer of record under this model. This confusion can result in an additional administrative burden for the CD-PAS program agency.

Conclusions and Recommendations Regarding IRS Employer Agent Fiscal ISOs

States that wish to implement the IRS Employer Agent ISO model need to examine their existing payroll and fiscal accounting systems to assess their ability to accommodate the separate accounting and regulatory requirements needed for CD-PAS attendants. If a state's current systems can not accommodate the new and required functions, a state needs to assess the financial and operational feasibility of developing the additional capabilities. Finally, if the systems modifications are not operationally and/or financially feasible, then the state should consider implementing a Vendor Fiscal ISO model.

C. Vendor Fiscal ISO

1. Access, Level of Consumer-Direction and Responsibility

Like the IRS Employer Agent Fiscal ISO, the Vendor Fiscal ISO offers consumers a high level of consumer-direction and control and allows greater access to the CD-PAS program than afforded by the Fiscal Conduit ISO. Although the consumer is the employer of record for his or her attendant, under this ISO model, a private Vendor Fiscal ISO reduces the consumer's employer-related responsibilities by managing the payroll function (managing employment taxes, benefits where appropriate, and preparing and disbursing payroll checks) for the consumer.

2. Program and Cost Efficiency, Compliance and Accountability

Unlike the IRS Employer Agent Fiscal ISO, the Vendor Fiscal ISO can offer states a reasonable level of program and cost efficiencies related to the administration of the program, particularly if the state effectively negotiates the state's Vendor Fiscal Agent ISO

contract and the fees to the ISO. Since the state is using a vendor to perform fiscal and administrative functions on behalf of consumers and the state, it should develop explicit performance standards in the vendor contract so it can effectively monitor each vendor's ability to fulfill their responsibilities and their commitment to consumer-directed principles and the Independent Living philosophy.

As with the IRS Employer Agent ISO, the Vendor Fiscal ISO model can achieve a high level of compliance with IRS and DoL laws since the vendor is performing the payroll function for consumers. Moreover, this model can also achieve a high level of program and fiscal accountability if the state drafts and implements effective vendor performance standards in Vendor Fiscal ISOs' contracts.

Conclusions and Recommendations Regarding Vendor Fiscal ISOs

This study concludes that the Vendor Fiscal ISOs offer states many advantages in terms of administrative and cost efficiencies while reflecting a high level of consumer-direction for consumers.

While the states that used this ISO model appeared to be reluctant to permit participating consumers to use surrogates (e.g., a person the consumer designates to act on his or her behalf such as a family member, friend, holder of the durable power of attorney, or guardian), there is no reason why consumers with surrogates cannot participate in a CD-PAS program that uses this type of ISO, provided that appropriate monitoring policies and procedures related to surrogates' performance are in place.

D. Agency with Choice ISO

1. Access, Level of Consumer-Direction and Responsibility

In this model, the ISO is the legal employer of record and the consumer is considered the *managing employer*. Agency with Choice ISOs can offer consumers varying levels of consumer-direction depending on the desires and abilities of the consumer and the philosophy of a particular ISO. This ISO model can significantly reduce the level of consumer responsibility depending on what employer-related tasks it performs for consumers other than the payroll function.

2. Program and Cost Efficiency, Compliance and Accountability

The Agency with Choice ISO can provide a high level of program efficiency since it manages a significant portion of the administrative work associated with CD-PAS programs. This ISO model can be cost efficient if the state CD-PAS program agency effectively negotiates its contract and fees with the ISO.

Conclusions and Recommendations Regarding Agency with Choice ISOs

Agencies with Choice ISOs can offer states and consumers varied levels of consumer-direction depending on the type of consumers participating in the CD-PAS program and the ISO's commitment to consumer-direction and the Independent Living philosophy. Even if the ISO is agency-based, the ISO will not necessarily have high administrative costs similar to traditional home health agencies. Proper rate negotiation by the state can result in this model being quite cost effective. Moreover, if the proper consumer-directed philosophy is followed in agency practices, this ISO model can potentially serve consumers with a broad range of ages and disabilities.

This study recommends that states using the Agency with Choice ISO model in the design of their CD-PAS program offer consumers varying levels of consumer-direction depending on the needs and desires of the consumer population. Moreover, states should consider allowing consumers to use Agency with Choice ISO in order to obtain relief attendant services. Finally, this study recommends that state CD-PAS programs that use Agency with Choice ISOs develop performance standards that effectively monitor an ISO's and its subcontractors' commitment to and application of consumer-direction principles.

E. Supportive ISO

1. Access, Level of Consumer-Direction and Responsibility

Supportive intermediary services provided by either a stand-alone ISO or incorporated in one of the other ISO models, can enhance the level of access and consumer-direction afforded to consumers. These services can also assist consumers with the employer responsibilities associated with CD-PAS and in some cases (i.e., by maintaining an attendant registry), actually reduce such responsibilities for consumers.

2. Program and Cost Efficiency, Compliance and Accountability

Depending on how these services are administered, bundled and reimbursed, supportive services can be more or less efficient from a program and a cost perspective. They do enhance consumer compliance with regulatory mandates and can indirectly enhance CD-PAS program and fiscal accountability by developing more well informed consumers.

Conclusions and Recommendations Regarding Supportive ISOs

Supportive services, whether offered by a “stand-alone” support agency or as part of an ISO’s service package, are highly effective in enhancing consumers’ access to and success with CD-PAS programs. The key to the effectiveness of these services seems to be the spirit in which the services are provided, not the institutional setting or organizational framework. If the provider of supportive services adheres to the Independent Living philosophy, consumers’ access to and participation in CD-PAS programs are enhanced. Fees do vary significantly and must be effectively negotiated and monitored in order for the state CD-PAS program agency to be a prudent buyer of these services.

This study recommends that supportive intermediary services either assist the CD-PAS consumer with conducting criminal background checks on potential attendants or directly conduct them for consumers. The study also recommends that states develop global fees for a package of supportive services rather than purchasing each service separately.

F. Spectrum ISO

1. Access, Level of Consumer-Direction and Responsibility

The Spectrum ISO model maximizes access and consumer-direction for consumers participating in a CD-PAS program while allowing consumers to assume the level of employer responsibility they feel comfortable with. Consumers may or may not be the employer of record of their attendant depending on the intermediary service option(s) selected by the consumer.

2. Program and Cost Efficiency, Compliance and Accountability

Well designed Spectrum ISOs can offer states program and cost efficiencies by developing a seamless CD-PAS service delivery system. This ISO model can also achieve a high level of regulatory compliance and program and fiscal accountability while allowing the consumer to select from a range of intermediary service options. The primary reason for this is because the Spectrum ISO has the ability to transfer unsuccessful consumers into an ISO option that reduces their employer responsibility (i.e., can move a client who is unable to comply with the employer responsibilities from the “cash” option to one where the ISO manages the payroll function for the consumer). This model may also be effective in assisting consumers to obtain relief attendants on weekends, holidays and when their attendants are absent for any reason.

Conclusions and Recommendations Regarding Spectrum ISOs

Use of the “Spectrum” ISO model permits a state to offer consumers a wide range of intermediary service options through a single umbrella organization. Thus, a state maintains control over the CD-PAS program and ISO design and philosophy, while at the same time, offers consumers a broad range of intermediary services to assist them in accessing and successfully participating in CD-PAS programs. This ISO model can eliminate the need for and the costs associated with multiple CD-PAS programs that use a variety of ISOs and allow a state to develop a seamless CD-PAS service delivery model. The Spectrum ISO also allows consumers to access the intermediary services that meet their current and future needs.

This report recommends that states consider implementing Spectrum ISOs when designing CD-PAS programs. The keys to a successful Spectrum ISO are: (1) good, testable performance standards in provider contracts, (2) a strong commitment from vendor ISOs’ and their subcontractors to the principles of consumer-direction and the Independent Living philosophy, and (3) periodic monitoring and evaluation of Spectrum ISOs and their subcontractors.

Conclusions and Recommendations that Cut Across ISO Models

There are a number of conclusions and recommendation that are applicable to all ISO models. These include the following.

1. The most successful State-ISO contract relationships are forged when the state has a clear understanding of the services it wishes to purchase from an ISO.

Therefore, state CD-PAS program agencies should develop contracts with ISOs that clearly state an ISO’s role, responsibilities and services. These contracts should include performance standards that can be used to assess an ISO’s activities and its commitment to consumer-directed principles and the Independent Living philosophy.

2. Consumers’s back-up plans for relief attendants frequently fail, causing consumers to have a difficult time finding relief attendants over weekends, holidays and when the primary attendant is absent for any reason.

Therefore, state CD-PAS program agencies should develop a mechanism that facilitates consumers access to relief attendants, possibly through an arrangement with a Agency with Choice ISO or a Spectrum ISO that offers an agency-based PAS.

3. Consumers are hesitant to initiate criminal background checks on prospective attendants because they do not know how to conduct them and they feel these checks compromise the consumer-attendant relationship.

Therefore, state CD-PAS program agencies should develop a standard user friendly system implemented by a program or an ISO, that either assists consumers in performing this task or directly conducts criminal background checks on prospective attendants for consumers.

4. The availability of supportive intermediary services varies by ISO model. However, some level of supportive services is key for consumers to successfully participate in a CD-PAS program.

Therefore, state CD-PAS program agencies should incorporate supportive intermediary services into their CD-PAS program no matter what other ISO model is used.

5. ISOs, and the agencies they subcontract with, vary in their commitment to consumer-directed principles and the Independent Living philosophy.

Therefore, states should develop performance standards in ISO contracts that address the ISO's and their subcontractors' commitment to consumer-directed principles and the Independent Living philosophy.

6. State nurse practice acts and their effect on CD-PAS programs vary from state to state.

Therefore, states should pursue exemptions to their nurse practice acts if possible, or should seek to develop protocols permitting delegation that are consistent with CD-PAS program goals and the Independent Living philosophy.

7. A number of states have considered personal care attendants to be independent contractors and some continue to consider them as such even though regulatory authorities have determined them to be *someone's employee*.

Therefore, states should design programs with mechanisms (including intermediary services) that assist consumers in complying with the IRS rules for household employees and avoid referring to personal care attendants as independent contractors.

8. A number of disability advocates and CD-PAS consumers expressed concern about the potential impact of managed care on the availability of CD-PAS to eligible consumers.

Therefore, state Medicaid managed care programs for the elderly and persons with disabilities should be designed to include and accommodate this important service option.

CHAPTER ONE

Introduction

I. Why Has This Study Been Undertaken?

In 1991, the Institute of Medicine estimated that 35 million Americans--one of every seven--had a disability that interfered with their ability to conduct daily activities. Of these persons, it has been estimated that 3.1 million Americans, nearly one third of whom are under the age of 65, would qualify to receive benefits (ASPE, 1994). Historically, professional authority has played a dominant role in the social organization of medical care and related human services (Doty, Kasper and Litvak, 1996; Friedson, 1970). Moreover, until recently, formal, publicly-funded home and community-based long-term care (HCB-LTC) services have been narrowly focused on the elderly population, limited by implicit assumptions about retirement lifestyles and conceptualized in terms of “alternatives to institutionalization.”

Over the past twenty years, with the development of the Independent Living and Disability Rights movements, there has been a growing societal recognition of the barriers that often prevent persons with disabilities and chronic conditions--especially working age adults--from actively participating in the kinds of activities (e.g., school, work, recreation, and travel) that are engaged in by able-bodied persons. A fundamental premise of the IL Movement is that individuals with disabilities are “handicapped” primarily by barriers in their environments rather than by their impairments or disabilities (DeJong, Batavia and McKnew, 1992). Therefore, if such barriers are removed, people with disabilities can function normally in society (DeJong, Batavia and McKnew, 1992). One such barrier has been, and continues to be, the lack of access to appropriate *personal assistance services (PAS)* (DeJong, 1981, Litvak et al, 1987).

Another key premise of the IL Movement is that “persons with disabilities are self-directed consumers of services capable of managing their lives.” Persons with varying levels and types of disability--of all ages--who use PAS have long expressed their desire to exercise more choice and control over the PAS they receive (Doty, Kasper, Litvak and Taylor, 1993 and 1994). This premise and desire is supported by the emerging ideology of “consumerism” which has begun to assert itself in the health and human service domain (Doty, Kasper and Litvak, 1996). Thus, from the IL and Disability Rights movements and the emergence of consumerism in health and human services has developed the concept of *consumer-directed personal assistance services (CD-PAS)* (Litvak, Zukas, and Heumann, 1987; DeJong, Batavia and McKnew, 1992; Simon-Rusinowitz and Hofland; Doty, Kasper and Litvak, 1996).

The term *personal assistance services (PAS)* refers to a range of human and mechanical assistance provided to persons with disabilities of any age who require help with routine activities of daily living (ADLs) and health maintenance activities. These

services, when provided in non-institutional settings, are also frequently referred to as “home and community-based long-term care.” PAS is the term preferred by persons with disabilities as well as by professionals in the disability and aging fields who advocate consumer-directed PAS models as a means of maximizing the independence and autonomy of persons who need functional assistance from others. Although PAS is broadly defined as including assistive technologies, home modifications, psychosocial rehabilitation, and a host of other specialized products and services oriented to persons with disabilities and chronic conditions, the core service is personal assistance. PAS are typically provided by an unskilled person who is variously referred to as a *personal care assistant (PCA)*, *attendant* or *aide* (Doty, Kasper and Litvak, 1996).

Consumer-directed modes of financing and delivering PAS permit the consumer--as opposed to medical or social work professionals--comparatively greater choice and control over all aspects of service provision including: (1) recruiting, hiring, and training attendants, (2) defining attendants’ duties and work schedule (3) supervising attendants regarding how specific tasks are to be performed, (4) managing the payroll functions, including paying attendants, and (5) disciplining and discharging attendants. CD-PAS programs may be ranked on a continuum as more or less *consumer-directed* to the extent that the programs foster greater choice and control with regard to several of the above mentioned tasks (Doty, Kasper and Litvak, 1996). Consumer-direction is maximized when the consumer purchases his or her PAS with personal resources (unless he or she relinquishes the employer tasks to a provider agency). However, when a third party payor is involved in financing PAS (e.g., private insurance or publicly-funded programs such as Medicaid), certain limitations may be placed on the consumer’s ability to exercise choice and control over his or her PAS.

Advocates of CD-PAS programs argue that persons with disabilities and chronic conditions should be afforded as much independence and autonomy as possible in decisions regarding the types, amounts, and sources of PAS they can access, especially related to PCA services. But with choice and control come responsibility and risk for the consumer, as the attendant may be considered the consumer’s employee rather than an independent contractor under the IRS and DoL definitions of *domestic servants* (Flanagan, 1994; Gibson, 1992; O’Neil and Nelsestuen, 1993; Sabatino and Litvak, 1995; Szabo, 1993). Moreover, persons with disabilities and chronic conditions vary greatly in their ability and desire to manage their PAS.

Finally, CD-PAS programs may allow a consumer to have a surrogate, (either a family or non-family member), manage the employer-related responsibilities associated with employing an attendant on the consumer’s behalf (as in the case of a person who may have a cognitive impairment or mental retardation). CD-PAS programs that allow surrogate participation can greatly increase consumers’ access to CD-PAS services. However, CD-PAS program administrators must be vigilant in monitoring issues of consumer health and safety and PAS quality for this population when surrogates are used.

A number of states have implemented state and Medicaid-funded CD-PAS programs. The use of public funds raises significant questions related to the use of public funds, program and fiscal accountability, regulatory compliance and liability for adverse outcomes for consumers which must be addressed. Because of these issues, states have begun to develop a variety of *intermediary service organization (ISO)* models to facilitate the use of CD-PAS programs by persons with disabilities and chronic conditions of all ages and to assist government policymakers in achieving an appropriate balance among the competing goals of: providing appropriate PAS that affords consumers choice and control, while assuring program and fiscal accountability, regulatory compliance, protection from liability, service quality, and consumer health and safety.

An intermediary service organization (ISO) is an entity that acts as an interagent between a CD-PAS program and eligible consumers for purposes of disbursing public funds and assisting consumers in performing tasks associated with the employment of PAS attendants. From the perspective of CD-PAS program, the core tasks of an ISO are: (1) to directly ensure compliance with legal requirements related to employment of PAS attendants and/or (2) to offer supportive services to perform the required employer tasks themselves.

When the ISO performs these tasks directly, it may, for example, calculate Social Security, Medicare (FICA), and federal and state unemployment tax (FUTA/SUTA) and make all appropriate tax filings with regard to the attendant. It may also broker and administer attendants' fringe benefits, if available. On the other hand, an intermediary may simply assist an eligible consumer by offering training in when and how to manage the employment tax and payroll responsibilities. In such cases, the ISO may monitor a consumer's performance of these tasks to ensure that the consumer is complying with all applicable federal and state requirements associated with employing household help such as a PAS attendant.

ISOs may provide administrative/fiscal and supportive services to eligible consumers. Administrative/fiscal services can include: disbursing public funds, withholding and filing employment taxes, brokering benefits, preparing and disbursing payroll checks and processing employment-related documents including the INS Form I-9, IRS Form W-2 and timesheets. Supportive services can include: training related to the hiring, firing and supervising attendants, assisting consumers in obtaining temporary or emergency "back-up" services, providing peer counseling, conducting and/or assisting consumers with checking attendant references and/or criminal background checks, performing assessments, and providing case management.

There is no single set of services that an ISO must provide. Rather, the state CD-PAS program agency should design ISOs that can meet the specific federal and state regulatory requirements and the needs of the service population(s). For example, one ISO may focus exclusively on performing administrative/fiscal tasks (e.g., managing employment

taxes and payroll) on behalf of the consumer, whereas, another ISO may focus on supportive services, offering training and assistance to consumers so that they may perform the employer tasks themselves.

The ISO models examined in this study are the: Fiscal Conduit ISO, IRS Employer Agent Fiscal ISO, Vender Fiscal ISO, Supportive ISO, Agency with Choice ISO, and the Spectrum ISO.

Prior to this study, little was known of the ISO models currently being used by states' CD-PAS programs, how well they meet the objectives of the various stakeholders (e.g., CD-PAS program administrators, the IRS and the U.S. Department of Labor, disability advocates, states' nurse licensing boards, and consumers and their attendants) and whether ISOs actually facilitate the use of CD-PAS and enhance consumers' choice and control. However, two earlier studies (Flanagan, 1994; Sabatino and Litvak, 1995) recommended that states use ISOs to manage the tax and labor law issues related to CD-PAS, and that states make available supportive services to consumers.

The purpose of this study, initiated by the Office of the Assistant Secretary for Planning and Evaluation (ASPE) at the U.S. Department of Health and Human Services, was to identify best practices for implementing CD-PAS programs using various models of ISOs by examining twenty-three state and Medicaid-funded CD-PAS programs in eleven states. It should be noted that due to the significant variation in state tax, labor and worker's compensation and disability insurance law, the focus of this study was on federal Internal Revenue Service (IRS) and Department of Labor (DoL) laws and their effect on CD-PAS programs and ISOs.

II. What Is The Purpose of This Report?

This final report provides practical advice to state program administrators regarding the implementation of CD-PAS programs using ISOs. In particular, Chapters III, V and VI taken together, constitute an informal manual of advice from which state program administrators can design CD-PAS programs using ISOs which are based on sound regulatory principles and well drafted contracts. Overall, this final report assists program administrators to design CD-PAS programs with ISOs that:

- comply with applicable federal tax and labor laws;
- make available supportive services that some consumers may want or need; and
- allow for the application and enforcement of any limitation or restrictions on consumer direction that may be required by state laws and regulations.

III. How Was The Study Conducted?

Twenty three CD-PAS programs in eleven states that used six models of intermediary service organizations (ISOs) were selected based on a sampling framework that included seven categories (See Appendix A). The seven sampling categories were derived from the literature, information gathered from a brief phone survey of state CD-PAS program administrators, and comment received from the study's technical advisory panel (TAP). A list of the TAP members may be found in Appendix II. The eleven states selected for this study were: Georgia, Idaho, Maine, Massachusetts, Michigan, New Hampshire, New York, Pennsylvania, Virginia and Washington State.

Semi-structured interview guides were developed and used to interview the key stakeholder groups in each state. Copies of the interview guides may be found in Appendix III.

Site visits and telephone interviews were conducted in the eleven study states between December 1, 1995 through August 30, 1996. One hundred fifty-eight interviews were conducted with one hundred eighty-nine respondents in the eleven states (See Appendix IV). Key stakeholders interviewed included: state CD-PAS program administrators, ISO administrators, executive directors of the states' board of nurses, and home health agencies, disability and elderly advocates, and consumers and their attendants. Of the one hundred eighty-nine respondents interviewed, forty-one were consumers and twenty-two were attendants.

Meetings and briefings were held with key central office staff at the Internal Revenue Service and Department of Labor to discuss IRS and DoL rules and regulations pertinent to the study.

The final report for the study addresses six policy relevant questions:

- What are the various models of ISOs and how do they operate?
- What are the federal laws and regulations issues that affect the development and operation of ISOs?
- How do contracts facilitate the operation of CD-PAS programs that use ISOs?
- What are the incentives and barriers that affect the development and operation of CD-PAS program with ISOs?
- How do States' nurse practice acts affect the development and operation of CD-PAS programs with or without ISOs?
- How well do the various ISO models facilitate the use of CD-PAS programs for state program administrators and consumers with disabilities and chronic conditions?

CHAPTER TWO

Characteristics of Consumer-Directed Personal Assistance (CD-PAS) and Intermediary Service Organization (ISO) Models

I. What Are Consumer-Directed Personal Assistance Services (CD-PAS)?

A. *What are Personal Assistance Services?*

There is a growing literature which provides a definition and a description of the key features of personal assistance services (Kennedy, 1993; Litvak, 1990; Litvak et al, 1991; Maton et al, 1993; NCOA, 1996; Nosek, 1991; Seelman, 1993). *Personal Care Assistance Services (PAS)* is a broadly inclusive term used to refer to a range of human and mechanical assistance provided to persons with disabilities and chronic conditions of all ages which enables them to accomplish “tasks that they would normally do for themselves if they did not have a disability” (Litvak et al., 1990). Such tasks include, but are not limited to, assistance with personal care (e.g., Activities of Daily Living (ADLs) such as bathing, dressing, grooming, toileting and transferring, and health maintenance activities (such as catheter care). PAS also enhances household maintenance (e.g., Instrumental Activities of Daily Living (IADLs) such as transportation, shopping, housecleaning, meal preparation and laundry). PAS are not just limited to services provided in specific settings (e.g., the home, office, recreation) nor are PAS limited to human assistance. PAS can also include assistive technologies, environmental adaptations, including transportation services, animal assistance (e.g., guide dogs), and the appropriate training for utilizing both human and other forms of assistance. The *core* service is personal assistance which is typically provided by an unskilled person who is variously referred to as a *personal care assistant (PCA)*, *attendant* or *aide* (Doty, Kasper and Litvak, 1996). The term PAS reflects the philosophy of the Independent Living (IL) movement and has been developed as a replacement or synonym for “home and community-based long-term care services” to take into account the needs of persons with disabilities and chronic conditions to engage in activities that able bodied persons would normally pursue.

B. *What are Consumer-Directed Personal Assistance Services?*

Consumer-directed modes of financing and delivering PAS permit the consumer--as opposed to medical or social work professionals--comparatively greater choice and control over all aspects of service provision, including the employer-related responsibilities associated with employing and supervising an attendant. However, with choice and control come significant employer-related responsibilities, some of which are mandated by state and federal laws and regulations. Some consumers have the ability and desire to manage these tasks and eagerly embrace the employer-related responsibilities associated with the “pure” CD-

PAS program model (e.g., cash benefit/voucher programs).¹ Others may not have the *ability* and/or *desire* to manage all of the employer-related tasks or may prefer to manage only a select few.

CD-PAS programs may be ranked on a continuum as more or less *consumer-directed* to the extent that the programs foster greater choice and control with regard to tasks mentioned earlier (Doty, Kasper and Litvak, 1996). Services purchased and financed by private individuals can afford consumers the highest level of choice and control (except when the consumer voluntarily relinquishes all or most of the employer duties and role by choosing to contract with a traditional provider agency). Publicly-funded CD-PAS programs place some limits on the consumer's choice and control over his or her PAS, particularly those that are federally-funded (e.g., Medicaid). In contrast, state-funded CD-PAS programs frequently offer more flexibility and a higher level of choice and control to consumers (e.g., allowing consumers to receive cash allowances and pay their attendants directly, and allowing persons with varying incomes to participate in a CD-PAS program based on a sliding fee scale).² However, the relative scarcity of state funds often limits the number of consumers who can participate and the amount of PAS a consumer may receive from state-funded CD-PAS programs.

CD-PAS programs that are financed as a regular optional Medicaid state plan benefit, and to a lesser extent, through a Section 2176 Medicaid home and community-based services waiver, have the potential to serve more consumers and provide more services/consumer because state funds are supplemented by federal matching funds.³ However, Medicaid rules may limit the level of consumer choice and control a CD-PAS program can offer consumers (e.g., consumers may not directly receive Medicaid cash benefits or pay their attendants directly with Medicaid funds at this time). Moreover, under Medicaid waivers,

¹ The GA Division of Rehabilitation Service Independent Living Program (only during its first year), the Maine Home and Community-based (HBC) Physically Disabled Program, the Maine HBC Voucher Program and the Massachusetts Medicaid Personal Care Attendant Program.

² Georgia's Division of Rehabilitation Services' Independent Living Program, Maine's Home-based Care (HBC) Elderly, Physically Disabled, Other Physically Disabled and Voucher Programs, Missouri's Personal Care Assistance Program, the Act 150 portion of the Pennsylvania's Attendant Care Program for the under and over 65 population, Virginia's Division of Rehabilitation Services Personal Assistance Services Program, and Washington State's Chore Personal Care Program are the state-funded CD-PAS programs examined in this study.

³ Georgia's Medicaid Independent Care Program, Idaho's Personal Care Services Program, Maine's Medicaid CD-PAS Program, Maine's Physically Disabled, Elderly, and Adults with Disabilities Waiver Programs, Massachusetts's Medicaid PCA Personal Care Attendant Program, Michigan's Home Help Program, New Hampshire's Medicaid Personal Care Assistance Program, New York's Concepts for Independence Program, the Medicaid HCBS waiver portion of the Pennsylvania Attendant Care Program, and Washington's Medicaid Personal Care Program and Copes Program are Medicaid optional and HCBS Waiver-funded programs examined in this study.

the type and number of consumers participating may be limited due to program eligibility requirements (e.g., consumers must be at risk of institutionalization; the cost of consumer's community-based services may not exceed the cost of institutional care in the aggregate; the use of relatives as paid attendants is restricted; and sliding fee scale arrangements are not always available).

Private entities such as insurance companies, concerned about liability to the company and the quality of PAS provided to the beneficiary, tend to afford their beneficiaries the lowest level of consumer choice and control. Consumers with private insurance are often required to purchase their PAS from traditional provider agencies that may not be able to accommodate the unique requirements of consumers' service needs. However, some private insurance companies have begun to consider offering a PAS benefit that uses a cash benefit and offers consumers a higher level of choice and control.

Both publicly and privately-funded CD-PAS programs may allow a consumer to be the employer of record for his or her attendant. Some may allow a consumer to have a family or non-family member act as a surrogate on his or her behalf for the purpose of hiring and managing his or her attendant(s). The use of surrogates is of great importance to persons with cognitive impairments and mental retardation who wish to exercise a level of choice and control over their PAS through a surrogate. The use of surrogates and the issues raised by surrogates continue to be examined by state program administrators and federal and state policymakers.

C. Why do Public Program Administrators Consider Developing CD-PAS Programs and What are Their Concerns?

Public program administrators considering designing and implementing CD-PAS programs do so for a number of reasons. First, they want to develop health and human service programs that appropriately meet the needs of their diverse service population(s). Second, states see CD-PAS programs as a way to reduce the administrative overhead costs related to the provision of traditional agency-based PAS. Finally, in some cases, states view CD-PAS programs as a mechanism to achieve overall budget savings and efficiencies by "downsizing" government through privatization of government functions.

At the same time, CD-PAS program administrators also have a number of concerns regarding the implementation of CD-PAS programs. First, they want to establish clearly that the CD-PAS program agency *is not* the employer of record of the PAS attendant. For the most part, states and private entities do not want to be the employer of record for attendants nor do they wish to be perceived as such, since this would increase their actual or potential responsibility for payroll, benefits and related administrative costs (e.g., union wages and benefits, worker's compensation, and pensions). Second, even where the state is specifically not legally the employer, states want to make sure that the CD-PAS program is in compliance with legally mandated state and federal employer-related requirements (e.g., FICA and FUTA/

SUTA, federal and state DoL minimum wage and overtime rules and OSHA, and state worker's compensation laws). Third, states want to be assured of a basic level of program and financial accountability (e.g., so that potential program fraud and abuse are minimized). Fourth, states and private entities are concerned about the impact any federal or state-specific requirements might have on the level of choice and control that can be afforded consumers (e.g., provisions of state Nurse Practice Acts that limit the duties that an attendant may perform; state attendant certification and/or training requirements; and federal Medicaid requirements that preclude paying some relatives as attendants, distributing a cash benefit to consumers and allowing consumers to pay their attendants directly with Medicaid funds). Finally, states are concerned with the correct apportionment of liability for adverse outcomes to consumers and attendants and the overall quality of services provided in a CD-PAS program (e.g., consumer and attendant health and safety issues). The first four issues are addressed with greater specificity in subsequent chapters of this report.

It should be noted that this study principally examined federal employment-related responsibilities related to developing and implementing CD-PAS programs. Often, there are state-specific requirements that may have a bearing on how a CD-PAS program is designed and administered (e.g., states' worker's compensation laws, provisions for minimum wage and overtime pay, and nurse practice acts). When developing and implementing a CD-PAS program, program administrators should make sure that the program design addresses *both* federal and state requirements before the program is implemented in order to avoid any problems with federal or state laws and regulations after the program is implemented.

D. Are Attendants Independent Contractors?

Initially, many state-funded and a number of Medicaid-funded CD-PAS programs sought to simplify the employer-related duties for consumers by designating attendants as independent contractors (ICs). As an IC, the attendant (not the consumer) is responsible for withholding and filing all federal and state required taxes and insurance. However, closer examination of federal Internal Revenue Service (IRS) and Department of Labor laws and regulations has led many analysts to the conclusion that personal care attendants are not eligible for independent contractor status (Gibson, 1992; O'Neil and Nelsestuen, 1993; Szabo, 1993). Rather, they are likely to be considered (by the regulatory authority) to be domestic servants under IRS and DoL laws and thus, *someone's* employees. After a number of years, some states found that many consumers and their attendants were not in compliance with IRS employment and income tax laws, and in at least one case (e.g., Missouri), a state had to repay back state unemployment insurance (SUTA) taxes which represented a significant financial burden for the state. The independent contractor issue will be discussed further in Chapter Three. It should be noted that some refer to attendants who are employed by a consumer rather than an agency as "independent providers." However, this term should not

be confused with the term “independent contractor,” which refers to a person who is not an employee of someone else.

As a result of the growing awareness of the applicability of employer tax and labor laws to PAS attendants, states have begun to develop strategies for effectively addressing the employment tax and attendant management issues related to CD-PAS. The goal of these strategies is to assist the consumer to assume and manage these employer-related responsibilities rather than having the state itself or a traditional home health agency assume the role of the employer for the PAS attendant. The centerpiece of this strategy is to develop and implement various models of *intermediary service organizations (ISOs)*. This study examined six ISO models: the *Fiscal Conduit ISO*, the *IRS Employer Agent Fiscal ISO*, the *Vendor Fiscal ISO*, the *Agency with Choice ISO*, the *Supportive ISO* and the *Spectrum ISO*. A detailed description of the characteristics of the CD-PAS programs and ISOs examined in this study can be found in Appendix V.1, V.2 and V.3, respectively.

II. What Are The Employer-Related Tasks Associated with CD-PAS?

When a consumer chooses to participate in a CD-PAS program that offers the highest degree of consumer choice and control (e.g., a cash or voucher-based CD-PAS program) there are a number of employer-related tasks that he or she may be responsible for, many of which are required by state and federal laws and regulations. These tasks can be divided into two categories: those related to human resource tasks and those related to employee management tasks. The following is a list of the tasks by category.

A. *Human Resource Related Tasks*

1. Attendant Recruitment, Hiring and Termination

- develop a job description
- advertise the job position or otherwise identify potential candidates
- develop an interview protocol
- interview potential candidates
- screen and evaluate candidates’ qualifications (e.g., conduct reference and criminal background checks)
- develop candidate selection criteria
- select attendant and notify all candidates of consumer’s decision; and determine/negotiate wages and benefits with new attendant

- supervise the completion and submittal of employment forms including verification of alien status (INS Form I-9), IRS Form W-4 and State employer tax withholding forms
- establish/arrange for emergency/back-up attendants
- develop criteria for evaluating attendants' performance
- issue praise related to good performance, warnings of poor performance and terminate attendant when necessary

2. Payroll Management and Disbursement

- obtain an employer identification number (EIN)
- authorize attendant timesheets and/or vouchers
- withhold and deposit state and federal income taxes, if requested
- withhold and deposit Social Security and Medicare tax (FICA) and federal and state unemployment tax (FUTA/SUTA) payments
- purchase benefits (e.g., worker's compensation, disability, health, life) and manage any withholding of premium payments when applicable
- make sure all federal and state DoL laws related to minimum wage, overtime and night attendants are complied with
- generate and issue paychecks
- issue IRS Form W-2's annually
- inform attendant about the Earned Income Credit provision and manage advanced EIC payments when appropriate
- issue bonuses and/or annual pay increases, when appropriate and possible

B. Employee Management Related Tasks

1. Attendant Supervision

- make sure that attendant receives any state-required training (e.g., home health aide or Red Cross training)
- develop list of tasks that attendant will perform and any *non-negotiable* issues (e.g., no smoking) and review them with attendant
- develop work schedule with attendant
- orient/train attendant regarding when and how required tasks are to be completed
- evaluate attendant's performance and provide regular, periodic feedback to attendant

Some public CD-PAS program impose requirements and/or limitations--in law, regulation, or informal policy guidelines--on how these tasks are to be performed. One example is the requirements and limitations placed on who can be hired as a paid attendant. The primary limitations are:

- *Bans or limitations on hiring family members as attendants.* States are free to impose any limitation they choose. However, the federal Medicaid law and regulations preclude the hiring and paying of “legally responsible” relatives (e.g., spouses to care for spouses and parents to care for their minor children). The majority of the CD-PAS programs examined in this study imposed some type of limitation on the hiring of relatives as paid attendants. However, state-funded programs afforded the most flexibility in this area. (See Appendix V.1, Exhibit F).
- *A number of states require criminal background checks to be performed and in some cases prohibit consumers from hiring convicted felons.* Of the states examined in this study, the states of Idaho and Washington conducted criminal background checks on all prospective attendants and the ISO for the New Hampshire’s Medicaid Personnel Care Assistance Program conducts criminal background checks on prospective attendants upon request by the consumer. Other CD-PAS program ISO will assist consumers in conducting them (See Appendix V.2, Exhibit J). One of the major findings of this study is that consumers overall were willing to check attendant’s personal references. However, they were very reluctant to conduct criminal background checks on prospective attendants. Reasons for this reluctance included: a lack of knowledge regarding how to conduct criminal background checks, a feeling that the process was “too formal” and “implied consumer doubt or suspicion” about the attendant, and that the whole process could would have a negative effect on the consumer’s relationship with his or her attendant. In fact, the process of conducting criminal background checks is fairly straightforward and, in some cases, if conducted by a neutral party (e.g., an ISO or state), could protect consumers from experiencing abuse.

Some public programs impose mandatory training or certification requirements on PAS attendants. Disability advocates believe that consumers with disabilities and chronic conditions know their own needs best and, therefore, are the most qualified to train their attendants. Moreover, mandatory standardized training programs and certification may limit the pool of available attendants for hire, especially if there is no funding mechanism for covering the cost of training and/or an attendant is not paid while he or she attends training.

A countervailing argument is that a standardized training program assures all consumers and program administrators that attendants have received a basic level of training in key areas of service provision, particularly regarding the delivery of personal care and health maintenance activities and consumer rights and confidentiality issues. Moreover, many older consumers with disabilities and chronic conditions have not been through extensive rehabilitation programs and are often not aware of the most appropriate and safe

methods of providing services. Thus, some consumers feel uncomfortable having sole responsibility for training their attendants.

Of the twenty-three CD-PAS programs examined in this study, only five programs (22%) required some type of formal training or certification for PAS attendants.⁴ For example, the majority of the Maine Medicaid Programs and the state-funded HBC Programs (except for the Physically Disabled Program) offer the choice of certified nurse aide (CNA) training or competency determined by an RN and the consumer and his or her surrogate where appropriate (See Appendix V.1, Exhibit D).

Attendant supervision is another area where some public programs impose limitations or requirements:

- *Some CD-PAS programs require periodic RN supervision.* This used to be a federal Medicaid requirement but this is no longer the case. Many of the CD-PAS programs examined in this study had some RN oversight at least during the initial assessment and periodic reassessment of consumers' services and hours.
- *Some CD-PAS programs want to clearly delineate each and every task an attendant may or may not perform for a consumer* (e.g., no "heavy cleaning," "no handling of medications," "no child care," "no household help for other family members living in the home"). Some states examined in this study did spell out the "allowable" and "non-allowable" tasks to a certain extent, particularly in the Medicaid-funded programs. In some cases, this study found that it was a good communication and management technique for consumers to "spell out" many of these issues in their contract with their attendant prior to the attendant working for the consumer.
- *Nurse practice acts may proscribe activities that can be performed by attendants.* The majority of state Nurse Practice Acts examined in this study contained language proscribing what activities could be performed by an attendant. The most effective mechanism found to make nurse practice acts "CD-PAS friendly" was by exempting CD-PAS from the state's nurse practice act. A less flexible mechanism found was nurse delegation. These issues will be addressed further in Chapter Four.

C. What Supportive Services Facilitate the Use of CD-PAS?

There are a number of supportive services that consumers may wish to receive in order to facilitate their use of CD-PAS. These services include, but are not limited to:

⁴ The Georgia Medicaid Independent Care Waiver and the State's Division of Rehabilitation Services Independent Living Programs, the Idaho Personal Care Services Program, and the Michigan Home Help Program (although training is not funded) and the New Hampshire Self-Determination Project require some type of training or certification for personal care attendants.

- service assessment and/or case management and service monitoring;
- peer counseling and support;
- access to employer management skills training;
- access to technical skills training for attendants;
- access to training regarding employer-related fiscal skills;
- access to criminal and certification (e.g., nurse aide registry) checks;
- access to an attendant registry; and
- access to emergency/back-up attendant services.

One important finding of this report is that no matter which other ISO model was used by a CD-PAS program (e.g., Fiscal Conduit, state IRS Employer Agent ISO, Vendor Fiscal ISO, Agency with Choice or Spectrum ISO), a key element in the ISO's success was whether or not it either had a relationship with a free standing Supportive ISO or incorporated supportive services within its program design. Thus, the availability of supportive services seems to enhance all consumers' access to and use of CD-PAS programs.

This section of the report has provided a complete list of tasks and issues that a state CD-PAS program administrator needs to address when designing and implementing a CD-PAS program that offers consumers the highest level of choice and control. The remainder of this report will focus on discussing how the use of ISOs assisted consumers in addressing these issues and/or reducing the burden of a number of employer-related responsibilities when participating in a CD-PAS program. Finally, the report offers "best practice" recommendations for accomplishing these objectives.

III. What Are Intermediary Service Organizations (ISOs) and What Role Do They Play in Facilitating CD-PAS?

One strategy for facilitating CD-PAS that has emerged from states' experience with developing and implementing CD-PAS programs is the use of the *intermediary service organization (ISO)* (Sabatino and Litvak, 1995; Flanagan, 1994). A detailed description of the ISOs used by the 23 CD-PAS programs examined in this study may be found in Appendix V.2 and V.3. ISOs can provide an array of fiscal and supportive services to state (and private) program administrators, consumers and attendants to assist them in administering and participating in the CD-PAS programs. ISOs vary in their corporate organization, the types of services they provide, the cost of administration and the nature of the employer/employee relationship of the ISO to the attendant. This study has identified eleven states that use six models of ISOs to administer their state and Medicaid-funded CD-PAS programs. The ISO models examined in this study are:

- Fiscal Conduit ISO.*** This model is often used by state and local governments to administer cash grant or voucher CD-PAS programs that allow consumers to receive public funds and pay their attendants directly. The government entity engages an ISO provider to serve as its fiscal conduit primarily for the purpose of disbursing public funds. The Fiscal Conduit ISO provider may also perform a limited number of administrative tasks related to the disbursement of public funds including, but not limited to: (1) the collection and verification of attendants' timesheets and (2) the submission of invoices to a government entity to obtain public funds for disbursement. States may see this ISO model as the most cost efficient method of administering a CD-PAS program, providing consumers with the highest level of consumer choice and control while allowing the state a minimum level of program and fiscal oversight. Thus, this ISO model is for consumers and their surrogates who wish to fully direct their PAS attendants (e.g., be the employer of record, receive a cash benefit, and directly manage and pay their attendant(s)) and for states who wish to achieve the greatest cost efficiency while maintaining a minimal level of day to day program management.⁵
- IRS Employer Agent (EA) Fiscal ISO.*** In this model, a state or local government agency may apply for and receive approval from the IRS (under IRS Revenue Procedure 80-4) to be the "employer agent" on behalf of the consumer for the purpose of withholding and filing attendants' employment taxes (e.g., FICA and FUTA/SUTA), preparing and disbursing payroll checks. The IRS Employer Agent FI may also broker and manage worker's compensation and state disability insurance premiums (where applicable), verify attendants' citizenship/legal alien status and distribute payroll checks to either the consumer or the PAS attendant. States are very concerned that PAS attendants may be deemed "de facto" state employees. Under this model, the government entity may perform these functions and insure accountability for these regulatory requirements without being considered the employer of record of the PAS attendants. The consumer remains the employer of record in this model (as in the Fiscal Conduit ISO model). However, the state plays an active role in the day-to-day management of the program. As a result, the state may experience increased administrative burdens and costs attributable to operating dual payroll systems (e.g., one for state employees and one for CD-PAS attendants and from fielding questions from attendants regarding their employment status.)⁶ Contracting with private vendors offers a way to reduce both these burdens.

⁵ The CD-PAS programs examined in this study that used a Fiscal Conduit ISO model were: the Georgia Rehabilitation Services' Independent Living Program during the first year of the program, the Maine Home Based Care (HBC) Physically Disabled Program, the Maine HBC Voucher Program, the Massachusetts Medicaid Personal Care Attendant Program and the Virginia Department of Rehabilitation Services Personal Assistance Services Program (until 8/96).

⁶ The CD-PAS programs examined in this study that used the IRS Employer Agent Fiscal ISO were: the Idaho Personal Care Services Program, the Michigan Home Help Program, and Washington State's state-funded Chore Personal Care, and the Medicaid Personal Care and Copes Programs.

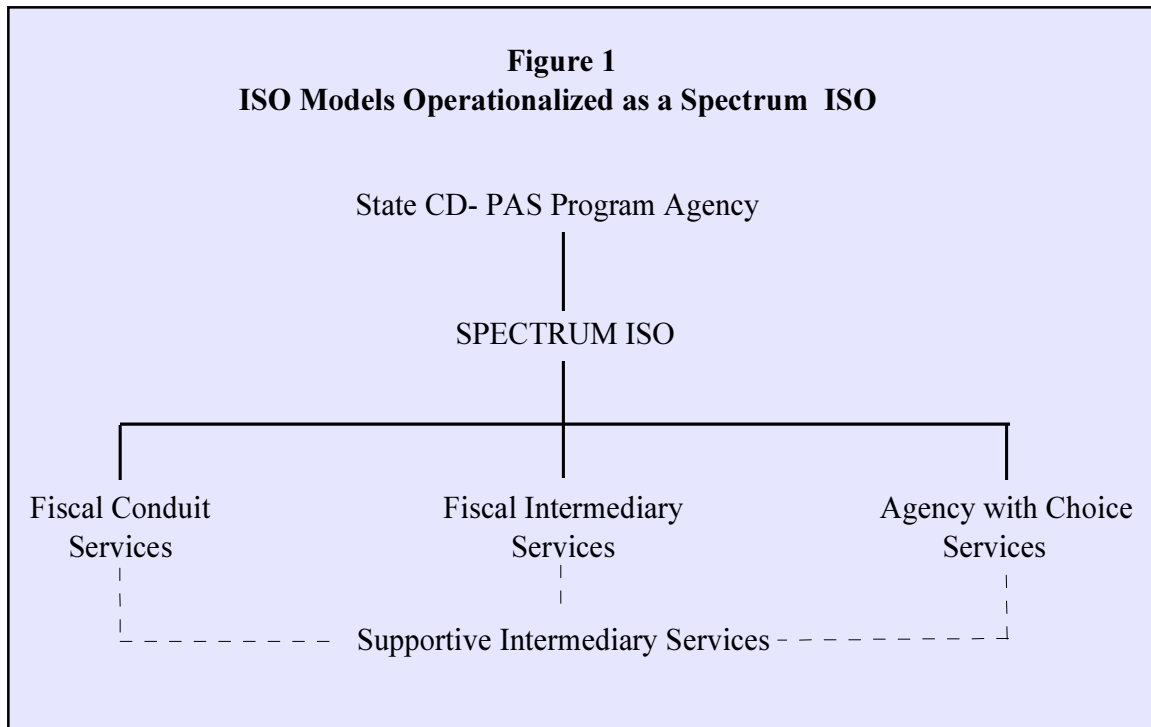
- ***Vendor Fiscal ISO.*** In this model, a private or public vendor or authority may apply for and be approved by the IRS (under IRS Revenue Procedure 70-6) to act as the consumer’s fiscal intermediary for the limited purpose of managing employment taxes and brokering/managing benefits, including income tax withholding, FICA and FUTA and SUTA, worker’s compensation, state disability insurance premiums (where applicable), verifying of citizenship/legal alien status and disbursing payroll checks to either the consumer or the PAS attendant. In most cases, the consumer remains the employer of record of the PAS attendant, retaining control over the hiring, firing, management and supervision of the PAS attendant. By engaging a Vendor Fiscal ISO provider, the state can remove itself by one level from the attendant, thus reducing its risk of being deemed the attendant’s employer.⁷
- ***Vendor Supportive ISO.*** In this model, a private or public vendor or authority may provide supportive services to consumers, and, on a limited basis, to PAS attendants. These services may also be incorporated in the ISO models. The supportive services provided may include: conducting self-direction evaluations of consumers, providing employer skills and self-advocacy training to consumers, assisting consumers with the recruitment, screening and hiring of attendants including conducting background checks and maintaining an attendant registry, and arranging for emergency/back-up attendant staff, determining and reassessing consumers’ service needs, and providing or arranging for training opportunities for attendants. Supportive services may also include the provision of case management and monitoring the quality of services provided and consumer and attendant satisfaction. The consumer may or may not be the employer of record of the attendant under this model. The supportive ISO can operate in conjunction with one of the other types of ISOs or supportive services can be offered within an ISO model.⁸
- ***Agency with Choice ISO.*** This model may include a variety of different types of agencies (e.g., Centers for Independent Living, social service agencies such as United Cerebral Palsy and Easter Seal, traditional home health and home care agencies and Area Agencies on Aging) that provide PAS to individuals in a consumer-directed manner. The agency is the employer of record of the attendant. However, the consumer is considered the “managing employer.” The key characteristic (and measure of “success”) of an Agency with Choice ISO is how committed the ISO is to the Independent

⁷ The CD-PAS programs examined in this study that used the Vendor Fiscal ISO model were: the Maine Medicaid CD-PAS and the Physically Disabled Waiver Programs, the Missouri Personal Care Assistance Program, and the Virginia Department of Rehabilitation Services’ Personal Assistance Services Program (as of 9/96).

⁸ The CD-PAS programs examined in this study that used the Supportive ISO model were: the Maine Medicaid CD-PAS and Physically Disabled and the HBC Physically Disabled Programs, the Missouri Personal Care Assistance Program, the Massachusetts Medicaid Personal Care Attendant Program and the Virginia Department of Rehabilitation Services Personal Assistance Services Program.

Living philosophy and the tenets of consumer-direction. In a highly consumer-directed Agency with Choice ISO (e.g., New York’s Concepts of Independence Program or New Hampshire’s Medicaid Personal Care Attendant Program), the agency may allow the consumer to recruit, train, supervise and discharge his or her own attendant while the agency acts primarily as the consumer’s fiscal agent and a resource for supportive assistance, as needed. Services and level of consumer-direction offered by an Agency with Choice ISO can vary significantly based on the type of administrative entity used (e.g., Center for Independent Living versus home health agency), the primary payor, geographic location of the ISO (e.g., rural versus urban) and type of consumers served (e.g., self-directing versus cognitively impaired individuals).⁹

- **Spectrum ISO.** In this model, the full range of fiscal, supportive and agency-based intermediary services are made available to the consumer under one umbrella CD-PAS program (See Figure 1). For example, a consumer may be



⁹ The CD-PAS programs examined in this study that used the Agency with Choice ISO model were: the Georgia Medicaid Independent Care Waiver and the Division of Rehabilitation Services Independent Living Programs, the Maine Medicaid Elderly and Adults with Disabilities and the HBC Elderly and Other Physically Disabled Programs, the New Hampshire Medicaid Personal Care Assistance and the Self-Determination Programs, and the New York Concepts for Independence Program.

the employer of record of his or her attendant and receive cash or a payroll check from the ISO for his or her attendant for PAS provided on weekdays. Then that same consumer may, under the Spectrum ISO, receive consumer-directed agency-based services on weekends and holidays. In short, Spectrum ISO is an operational model that allows a state to create a “seamless” financing and service delivery system for CD-PAS. It also creates the opportunity for consumers to select the intermediary services that “best fit” their needs throughout their lives while enhancing their choice, autonomy and control¹⁰

A description of the key characteristics of the six ISO models can be found in Table 1.

¹⁰ The CD-PAS program examined in this study that used the Spectrum ISO model was the Pennsylvania Attendant Care Programs for the over and under 60 age groups.

Table 1
Characteristics of the Six Intermediary Service Models

ISO Model	Operating Entity	Attendant's Employer of Record	ISO's Responsibilities
Fiscal Conduit ISO	Vendor	Consumer or surrogate	Disbursement of public funds via cash or voucher payments and related duties (e.g., invoicing state, processing attendant timesheets).
IRS Employer Agent ISO	State/County (IRS Rev. Proc. 80-4)	Consumer or surrogate	Process employment documents for attendants (e.g., INS Form I-9, IRS Form W-4 and W-2), manage employment related taxes (e.g., FICA, FUTA/SUTA), broker benefits where applicable, process and disburse attendants' payroll checks, process attendants' timesheets, and invoice state CD-PAS program to receive public funds. Act as a fiscal agent on behalf of consumer and/or surrogate.
Vendor Fiscal ISO	Vendor (IRS Rev. Proc. 70-6)	Consumer	Employer Agent above.
Supportive ISO	Distinct vendor or services provided through other ISO models	Consumer or agency	Provide employer skills training to consumers including employment tax and payroll management, assist consumers in recruiting and hiring attendants including conducting criminal background checks and maintaining attendant registries, monitor quality of services and consumer satisfaction and provide case management services and consumer assessments.
Agency with Choice ISO	Agency (e.g., CIL, Home Health, AAA, or Social Service)	Agency or its subcontracting agency (e.g., CIL, Home Health, AAA, or Social Service Agency)	Invoice state for public funds, process employment documents and criminal background checks on attendants, manages employment taxes and payroll for consumers. Can provide management training to consumers, conduct consumer assessments facilitate/provide relief attendant services, provide skills training to attendants, monitor service quality and consumer and attendant satisfaction, and assist consumers with hiring attendants or refer attendants directly to consumers.
Spectrum ISO	Agency (e.g., CIL, Home Health, AAA, or Social Service) and subcontracting agencies, if applicable	Consumer or agency	Provide Fiscal Conduit, Fiscal Agent, Supportive and Agency with Choice service directly to consumers or through the use of subcontractors under one CD-PAS program.

CHAPTER THREE

TAX, LABOR, WORKER'S COMPENSATION AND DISABILITY INSURANCE, AND IMMIGRATION LAW ISSUES RELATED TO CD-PAS PROGRAMS

I. Overview of Federal and State Laws Affecting CD-PAS Programs

Consumer-directed personal care services (CD-PAS) are premised on the consumer's ability and desire to take charge of the employment relationship and to tailor PAS to meet the consumer's personal needs. With increasing control comes responsibility for compliance with all laws and regulations affecting the employment relationship. A major challenge facing consumers receiving PAS under this modality is compliance with the numerous tax and labor law rules (state and federal) that apply to household employers. The consumer must either master the rules and do the related record-keeping and paperwork or must engage expert help to achieve compliance with these rules.

States designing CD-PAS programs for consumers at all levels of desire and ability must pay particular care to employment tax and labor laws in an era of increasing federal and state concern about benefits for household workers. State administrators must first identify the potentially applicable rules and then must find optimal ways of ensuring compliance, balancing the consumer's desire for independence and control, the state's concern for prudent fiscal management of public monies and the attendant's expectation of qualifying for job-related credits such as FICA, FUTA/SUTA eligibility and earned income credits. CD-PAS consumers are not a homogenous group in terms of desire and ability to perform these fiscal and administrative tasks. Thus, the key to success for state programs is to build flexibility into the program design, emphasizing the independence of those who are willing and able to take on these tasks themselves, on the one hand, and providing supportive administrative and fiscal services to those who desire to benefit from outside expertise.

This study examined ways in which states could use intermediary service organizations (ISOs) to provide consumers desiring such help the expertise and administrative efficiency needed for compliance without compromising the fundamental premises of the Independent Living philosophy underlying CD-PAS programs. The study examined a number of different approaches to the regulatory compliance issues, identified outstanding regulatory problems, and developed a number of recommendations for best practices. This Chapter will discuss some of the important rules affecting CD-PAS household employers and ISOs assisting them. Chapter Six will discuss how the particular states studied used different ISO models to assist consumers with varying degrees of administrative and financial acumen to comply with the laws affecting household employees. Together, the recommended

best practices and the state experiences should provide program administrators with a guide to optimal design of effective CD-PAS programs meeting the needs of a variety of consumers.

II. Tax Rules Affecting CD-PAS Programs: Current Issues

Previous studies of tax laws affecting CD-PAS programs have identified a number of important requirements for program administrators to consider and incorporate in their CD-PAS program designs and rules.¹¹ The present analysis is based on the findings and recommendations contained in these studies, updated to include some recent communications from tax and labor authorities as well as reports from the field as to the actual policies and practices of CD-PAS programs using ISOs.

The regulatory issues discussed in this Chapter are based upon the premise that CD-PAS attendants are household employees and not independent contractors (i.e., self-employed) for purposes of applicable employment tax and labor laws. In the past, some states sought to characterize PAS attendants as “independent contractors” in designing their programs, and some may continue to do so today. The states’ primary purpose in calling the attendant an “independent contractor” is to emphasize that the state is not the employer of the attendant and does not hold itself out as such. However, when compliance issues have arisen (typically in an action commenced by an attendant seeking unemployment benefits or worker’s compensation from the state), these states have found that regulatory authorities look to the facts and circumstances of the employment relationship rather than to names or titles in deciding who bears the responsibility for complying with the law.

Because the nature of the relationship between the CD-PAS attendant and the consumer is such that the consumer typically exercises a considerable amount of control and supervision over the attendant: hiring, firing, training, managing, it is difficult to argue that the attendant is an independent contractor.¹² Our findings from the field support this conclusion.¹³

¹¹ Flanagan, S. (1994); Sabatino and Litvak (1995); Simon, N. (1996).

¹² For a detailed discussion of the “independent contractor” issue see Gibson (1992); O’Neil and Nelsestuen, (1993) and Szabo (1993).

¹³ CD-PAS programs in Idaho, Missouri, New York, Massachusetts, Pennsylvania, Michigan and Virginia initially characterized attendants as independent contractors. Subsequently, all of these programs except the Massachusetts program and the Pennsylvania program (in a few limited cases) discontinued their use of the term “independent contractor” to characterize PCAs. These programs have all adopted some form of ISO model to assist consumers to achieve regulatory compliance. In Virginia, Washington State and in Georgia’s Division of Rehabilitation Services Independent Living Program, consumers were initially solely responsible for all employer-related tasks, including employment tax compliance. Experience in both these states proved that few consumers were able to achieve a satisfactory level of compliance. In Georgia, case managers had to assume this responsibility in addition to their usual tasks. These states have now turned to Fiscal ISO models to achieve regulatory compliance.

If the attendant is an employee, the consumer is the attendant's employer unless the attendant is formally employed by an agency or directly by the state. CD-PAS consumers thus join a growing number of householders who find that they have a considerable array of tax and labor rules to observe for their household employees. While the federal government has tried to extend a helping hand to the uninitiated, the responsibilities of employers of household employees may seem daunting to some who are seeing them for the first time. These requirements are as daunting to a CD-PAS consumer as they are to any other household employer, but, like many other Americans, the CD-PAS consumer may decide to seek expert help with these rules.¹⁴ A "good" CD-PAS program is one that offers consumers the level of consumer-direction that they desire while offering intermediary services to assist them with these new responsibilities.

The rules, and suggestions on optimal ways to comply with them in CD-PAS programs, are discussed below.

A. Income, Social Security and Unemployment Tax Issues for Household Employees: Overview

1. Income Taxes

Most employers withhold federal and state income taxes from their employees' paychecks, but withholding is optional for "domestic service provided in a private home." Where withholding is optional, employees would probably prefer that an employer not withhold income tax payments from their checks because withholding reduces net take home pay. If the employee wishes income taxes withheld, the employee may give the employer a completed Form W-4V. In cases where the income tax is not withheld, it must still be paid by the employee where tax is due. In any event, the employee must file a federal and state income tax return.

The employer, for his or her part, must still report worker income annually and provide each employee with a Form W-2 (Wage and Tax Statement) for the preceding calendar year by January 31 of the following year.¹⁵ Note that even if an attendant were considered an independent contractor, the consumer (or his or her agent) would still have a responsibility to issue IRS Form 1099 at the conclusion of the tax year, sending a copy to the attendant and to the IRS. Finally, whether the employer withholds income or not, the

¹⁴ One state official predicted that CD-PAS consumers and ISOs assisting them might be more likely to achieve compliance than other filers. It appears that this prediction was not far from the mark. See Morrow, David, "Nanny Tax Tally of '95: Who Paid? Who Lied?" New York Times, April 21, 1996.

¹⁵ Sabatino & Litvak (1995) at pp.22-27.

employer still has responsibilities to certain low-income employees with respect to the Earned Income Credit (EIC).¹⁶

2. Social Security Withholding (FICA)

The Federal Insurance Contribution Act (FICA) requires contributions from employers and employees to fund social security benefits (including Medicare) for future generations. There is a tax on employers and a contribution levied on the wages of employees. Household employees are not exempt from this levy, and their employers are responsible for the payments and the filings. Instructions from the IRS inform household employers that they are responsible for both the employee's share of the FICA and Medicare taxes as well as their own.¹⁷ The IRS has created special forms and instructions for household employers as a result of the Social Security Domestic Employee Reform Act of 1994 (SSDERA), simplifying and streamlining the process to dovetail with the individual employer's Form 1040 preparation and filing (See Appendices IX.7 and X.4 for current IRS instructions and publications addressed to household employers).

3. Federal Unemployment Tax Act (FUTA)

Employers of household workers must withhold and pay federal and state unemployment tax (e.g., FUTA and SUTA) for their employees. If an employer pays cash wages to a household employee totaling \$1,000 or more in *any* calendar quarter, the first \$7,000 of such cash wages paid in the taxable year are "FUTA" wages and subject to tax. The FUTA tax is currently 6.2 percent of the employee's "FUTA" wages. As with the FICA taxes and contributions, the filing and payment of unemployment tax by household employers may now be accomplished by filling out an IRS Schedule H during the annual income tax reporting period, whether or not the employer is required to file an IRS Form 1040 (See Appendix IX.7). Individual filers are instructed not to withhold the FUTA tax from the employee's wages but to pay it themselves by filling out the appropriate lines on Schedule H of the Form 1040. The amount of FUTA tax payable on the federal form is

¹⁶ The Massachusetts Personal Care Attendant Program has long operated on the premise that workers are independent contractors. The obligation to report worker income is handled in various ways by different ISOs. Some ISOs send a Form 1099 to the consumer depicting the sums paid to the attendant as income to the consumer. These ISOs instruct the consumer, upon receipt of this 1099, to prepare and send an additional 1099 to each attendant, listing the wages as income to the attendant. This irregular practice has created confusion for attendants and consumers alike. Other ISOs in Massachusetts simply instruct the consumer to send a Form 1099 to the attendant. The attendant is then supposed to pay self-employment tax, but there is no monitoring to ensure that attendants do so.

¹⁷ Individual filers may either withhold the employee's share of social security and Medicare taxes from wages, or pay them from the employer's own funds. If so paid, the sum paid on the employee's behalf is considered in the employee's wages for income tax purposes. See Publication 926, Household Employer's Tax Guide for wages paid in 1996, page 4, Appendix X.4.

reduced by a credit for the amount paid under state unemployment tax acts (SUTA payments).¹⁸

An alternative method that an employer or fiscal agent may use to report attendants' annual FUTA payments is the IRS Form 940 (see Appendix IX.9). This method allows the employer to adjust for overpayment of FUTA.

B. Tax Issues Affecting CD-PAS Programs

1. Appointing an Agent: Consumer/Employer May Appoint a Public or Private Agent.

The foregoing brief review of tax requirements highlights the important areas in which compliance must be achieved either directly by the consumer/employer or by an agent (ISO). In the context of CD-PAS programs, it appears that ISOs can assist the consumer in achieving compliance in a variety of different ways. The ISO need not directly perform the regulatory work but may simply provide training in budgeting and fiscal management to consumers with the desire and ability to do this fiscal and administrative work themselves. ISOs may thus provide a range of services depending on the needs and desires of the consumer, from direct service (e.g., preparing and filing tax returns) to supportive services (e.g., financial counseling, help with budgeting).

In cases where the ISO is *directly* responsible for tax compliance on the consumer's behalf, the administrative services may be provided by the state agency itself (IRS Employer/Agent) or may be provided by a vendor with which the state has contracted (Vendor Fiscal ISO). In both cases, the consumer remains the employer of record, managing all day to day aspects of the employment relationship with the attendant; the ISO, for its part, stays abreast of all regulatory requirements, keeps most of the records, prepares the filings and makes the payments. In both cases, the consumer appoints the intermediary as tax agent by completing IRS Form 2678 (See Appendix IX.1).

In the eyes of the IRS, IRS Employer/Agent ISOs (state agencies) and Vendor Fiscal ISOs under contract to state agencies are equally acceptable as agents for the consumer/employer. The only difference between the two in terms of filing is that vendor fiscal ISOs are responsible by law for filing individual copies of Form 2678 (Appointment of Agent) for each consumer they represent because they are governed, as are most agents, by the terms of Revenue Procedure 70-6. (See Appendix VI-1). A subsequent Revenue Procedure (Rev. Proc 80-4, Appendix VI.2) exempts public agents from this burdensome administrative requirement by allowing the public agent filing on behalf of multiple consumers simply to attest that Form 2678 has been completed by each consumer for whom the agent is filing.¹⁹

¹⁸ IRS Publication 926 (Household Employer's Tax Guide) ; Instructions for Household Employers. See also Sabatino & Litvak (1995) at pp. 30-34.

Even though the federal tax authorities are well-prepared to deal with cases where the consumer is represented by an agent (public or private), there are still a number of complex tax issues arising from the recent amendments to the Social Security Act as a result of the SSDERA of 1994 that require clarification in order for ISOs to operate effectively and efficiently on behalf of the consumer/employer. Issues most commonly raised by states using ISOs (public or private) to prepare and file taxes on behalf of consumers are discussed below, followed by “best practice” recommendations.

2. Selected Employment Tax Requirements Affecting Public and Private ISOs Acting as Agents

The Social Security Domestic Reform Amendments of 1994 (SSDERA of 1994, referred to colloquially as the “Nanny Tax” amendments) were aimed at extending the benefits of the Social Security Act to persons employed in the home. Recognizing that many householders might be daunted by the new filing requirements, Congress did two things to alleviate potential difficulties: one was substantive and the other was procedural. The substantive “relief” for householders consisted of raising of the threshold for compliance with the law from \$50.00 per quarter to \$1000 per employee per year. This meant that the new amendments would affect fewer household employers: after 1994, any householder paying a household employee *less* than \$1000 per year has no obligation whatsoever to make FICA contributions on behalf of the employee.²⁰ The procedural relief consisted of a new filing process allowing individual household employers to bypass the quarterly filing and depositing rules applicable to most employers and simply to report and pay any employment taxes at the end of the taxable year using a new Schedule H and filing it along with the householder’s Form 1040 (when appropriate) or by itself, if no 1040 is due.

But not all householders want to prepare and file their own household taxes. How does the new system created by the SSDERA work out in practice when the filer is not the individual householder but an agent? This question is of particular importance to CD-PAS programs using ISOs. The issues are discussed below in subsections a. through n., along with suggested “best practices.”

¹⁹ In practice, the IRS has been accepting employment tax filings from public and private vendors without requiring the intermediaries to file individual copies of the appointment of agent form for each consumer represented (Form 2678). Field interviews revealed no case in which the IRS compelled a private vendor to file individual appointment forms with the employment tax filings made on behalf of the consumers.

²⁰ This also means that the employee is not eligible for benefits (e.g. Social Security credit) until he or she earns at least \$1000 per year from each individual employer. Moreover, while an employee formerly needed to earn only \$630 per quarter to earn a Social Security credit when the \$50 threshold was in place, the same employee receives no Social Security credit until he or she has earned \$1,000 or more annually from an individual employer.

a. *Annual or Quarterly Filing? Effect of \$1000 Threshold for FICA; FUTA Tax Filings Under SSDERA.*

Household employer tax rules, instructions and the forms implementing them are geared to the individual filer, allowing the individual household employer to make FICA and FUTA payments at the end of the year by filing a separate Schedule H with his or her IRS Form 1040, annual income tax return. However, the Service recognizes that some household employers are publicly-aided individuals represented by a state IRS Employer Agent (public) or a Vendor Fiscal ISO (private). IRS Notice 95-18, issued in the year following enactment of the SSDERA of 1994, instructs “state and local government health and welfare agencies” that they must “report FICA taxes and withheld income taxes with respect to these individuals [employees] quarterly on a Form 941 and report FUTA taxes annually on a Form 940 (See Appendix VII for IRS Notice 95-18).²¹

However, recent instructions issued by the IRS for individual filers seem to suggest that the IRS would accept a Schedule H prepared by filers acting as *agents* for consumers. A special note in the 1996 Instructions for Household Employers (Appendix IX.7) informs household employers that “if a *government agency files Schedule H for the worker*, you do not need to file it.” (emphasis added). It appears, therefore, that ISOs acting as *agents* for consumer/employers have two options: (1) They can prepare a Schedule H at the end of the taxable year for each consumer in the program and send it to the consumer to be submitted with the consumer’s annual tax return (Form 1040) or, (2) They can follow the instructions contained in Notice 95-18, and file employment tax returns quarterly on Form 941 (FICA) and annually on Form 940 (FUTA). Each choice has advantages and disadvantages for consumers and program administrators. Annual filing is discussed first, followed by a discussion of the merits of quarterly filing.

What are the advantages of having the ISO prepare a Schedule H to be signed and filed by the consumer with the consumer’s Form 1040 Individual Tax Return? First, there is the advantage of knowing whether or not the \$1000 yearly, per worker, threshold has been met. If the filer can wait until the end of the taxable year to file the employment tax information required by Schedule H, the consumer and the ISO know which attendants (if any) have met the threshold and how much tax is actually due. Second, by waiting until the end of the year, the taxpayer (and the employee) have enjoyed the use of the funds all during the taxable year instead of having to pay on a quarterly basis. A third ostensible advantage is that the single Schedule H obviates the need for filing four quarterly reports on Form 941. However, this advantage is diminished in a program with many consumers.

²¹ The notice is addressed to public agencies and is silent with regard to private vendors under contract to the state to perform these functions on behalf of consumers. Nonetheless, the practices that it recommends would seem to be applicable to any entity acting as an agent for a large number of consumers, as in the case of CD-PAS Vendor Fiscal ISOs.

Using the Schedule H to report employee wages and related taxes has some disadvantages, too. If the ISO (as agent) prepares a Schedule H for each individual consumer/employer instead of a quarterly Form 941 on behalf of *all* program participants, the amount of administrative work for the ISO is obviously increased compared to the filing of a single Form 941 each quarter. Moreover, there is some risk that the consumer/employer may not set aside sufficient funds for payment of the tax if allowed to wait until the end of the year to meet this obligation. Finally, in large CD-PAS programs involving significant amounts of wages to employees considered in the aggregate, there is no advance depositing of tax if the filer does not file quarterly. This is not a problem for the program, to be sure, but it does seem to contradict the implicit assumption in IRS Notice 95-18 that filings will be made quarterly by government agencies representing consumers and that deposits will follow the rules governing household employers who file tax returns on a quarterly basis.²²

If, on the other hand, the ISO (public or private) prepares quarterly filings, as do most employers of household employees, any disadvantages of the Schedule H are eliminated: the ISO ensures that the tax will be paid by making advance reports and payments on a quarterly basis, avoiding the risk of penalties for late or inadequate payment; the ISO need not prepare individual Schedule H forms for each consumer but may report all program wages on a single Form 941. The quarterly method is therefore in many ways better suited to programs such as CD-PAS programs involving large sums in wages and many attendants.

One downside of the quarterly reporting is that take-home pay of household employees is reduced by the tax withholding (as it is for most employees already). If the rate of compensation is already low, this further depression of take home pay (even though attributable to a program designed to benefit workers) may make it harder for consumers to attract qualified attendants. Another downside of quarterly reporting is the ISO may have to send refund checks to employees who have not met the \$1000 threshold by the end of the taxable year.

Best Practice Suggestions for Filing Federal Employer Related Taxes

Filing quarterly reports of employee wages is the practice most likely to reduce paperwork for the consumer, ensure prompt payment of tax and avoidance of penalties, without compromising consumer control and independence. Program administrators should be alert to the matter of processing refunds due attendants whose yearly earnings do not meet the \$1,000 annual threshold and must be prepared to explain why net take home pay is reduced by these employment taxes. If the ISO elects to prepare Schedule H for the consumer, who then submits it with his or her tax form, the ISO should remind the consumer periodically of the need to set aside funds during the year to satisfy the employment tax liability.

²² See discussion below (section b) and IRS Notice 95-18, Answer to Question Five (Appendix VII).

b. *Deposit Rules for Quarterly Filers*

Employers (or their agents) filing quarterly reports of FICA and FUTA taxes withheld must not only prepare quarterly reports on Form 941, but must also comply with the rules on depositing withheld employment taxes (See IRS Publication 15 Circular E: Employer Tax Guide in Appendix X.6; IRS Notice 95-18 in Appendix VII). What is the impact of this requirement on state IRS Employer-Agent ISOs and Vendor Fiscal ISOs?

IRS Notice 95-18 states that “taxpayers who file Forms 941 (FICA) and 940 (FUTA) must pay or deposit FICA and FUTA taxes and any withheld income taxes for the household employees in accordance with the rules that apply to payment and deposit of those taxes with respect to employees who are not household employees.” Depending on the amount of withheld tax accumulated, the quarterly filer may have to deposit as often as semiweekly or monthly. This means that ISOs (public or vendor) who prepare the tax filings and accumulate withholding payments on behalf of consumers in the program must be prepared not only to file quarterly tax reports, but may have to make frequent deposits depending on how much money is accumulated in withheld tax.²³

Best Practice Suggestions for Depositing Federal Employer Tax Withholdings

ISOs should follow applicable depositing rules for employee wages paid to attendants participating in the program. Unless ISOs are simply preparing the Schedule H for the consumer or assisting the consumer to prepare Schedule H, the depositing rules must be observed. Program administrators should consult regional IRS personnel with any questions about this issue.

c. *Who Applies for the Employer Identification Number (EIN) and Does It Matter Whose EIN is Used?*

IRS Notice 95-18 instructs public agencies representing consumers to obtain a *separate* Employer Identification Number (EIN) for the filings made quarterly on behalf of consumers. The purpose of the separate number is to avoid confusion between the state in its capacity as *agent* for the consumer and the state in its capacity as the *actual* employer of attendants (which it is not in the case of CD-PAS programs in which the consumer is the employer). Nonetheless, some states are reluctant to apply for and use a separate EIN when acting in the capacity of the consumer’s agent even though IRS Notice 95-18 explicitly authorizes this practice. Even though the separate EIN does not make the state the employer of the attendants, states are leery of using it.

²³ IRS Notice 95-18 states that the IRS would waive penalties for late deposits for agents acting pursuant to Revenue Procedure 80-4 (state employer agents) and would permit end of year depositing and filing without penalty provided that all applicable taxes were deposited “on or before the due date of the applicable return.” The Notice was silent with regard to waivers for fiscal agents not covered by Revenue Procedure 80-4, but there is good reason to think that vendor agents under contract to state agencies to act as ISOs for consumers in CD-PAS programs would be similarly protected by this waiver.

Michigan actually lists two EINs on each quarterly filing it makes for the consumers in its program: its filings apparently list both the state's EIN and the EINs of the individual consumers. Virginia, which employs a vendor to prepare the employment tax filings, lists only the EIN of the vendor and not the State's EIN. The states' reluctance to use the separate "agent" EIN is understandable, but it can lead to administratively burdensome practices (such as Michigan's) or practices that do not conform to the advice provided in IRS Notice 95-18.

Best Practice Suggestions for Obtaining and Utilizing EINs

ISOs should follow the advice in IRS Notice 95-18 and apply for a separate EIN to be used only in filing employment tax returns in the ISO's capacity as agent.

d. Must the ISO issue a Form W-2 Representing Wages from Each Consumer Served by an Attendant?

ISOs (public or private) standing in the shoes of the consumer (employer) must send the employee a Form W-2 by January 31 of the year following the year in which the services were performed. If the employee performed services for more than one consumer/employer, it follows that multiple W-2's must be issued, each reflecting only those wages attributable to that employer.

The importance of correctly handling this matter cannot be overemphasized. If the ISO issues only a single W-2 reflecting *total* compensation earned by the attendant from the program, even though the attendant may have worked for several consumers, the aggregate program wages earned in a given year are likely to exceed the \$1000 threshold imposed by the Social Security Domestic Reform Act (SSDERA). If the ISO calculates withholding based on this aggregated amount, the FICA calculation may be erroneous because no FICA is due in a given case unless the attendant has earned \$1,000 or more from a given consumer. While aggregation would be beneficial to workers who earn small amounts from a number of different employers, Congress specifically rejected proposals to aggregate wages for purposes of calculating FICA. Thus, to comply with the letter and spirit of the law as it is currently written, ISOs must issue separate wage statements (Form W-2) reflecting wages attributable to individual consumer/employers.

Questions that have arisen with respect to the issuing of Form W-2 have not been answered definitively or systematically by the IRS. Field interviews with program administrators indicate that different practices are being followed in the various state programs. Some states appear to be over-reporting qualifying wages by aggregating attendants' program earnings and reporting them on a single W-2. Other states have sought the advice of regional IRS officials and are reporting wages per consumer on individual W-2, resulting in the issuing of multiple W-2s to a single attendant. While this has occasionally

caused confusion to the attendant, the practice has resulted in more accurate estimates of qualifying wages.²⁴

Best Practice Suggestions for Preparing and Filing IRS Form W-2's

ISOs should issue separate W-2's reflecting wages paid for services rendered to individual consumers. Program administrators should consult regional IRS personnel in their home state to resolve any questions about this procedure, pending a resolution of this issue by IRS and SSA policy officials in Washington.

e. Who Notifies Employee of Earned Income Credit? Who Advances Credit, Where Appropriate?

As the representative of the consumer, the ISO must notify attendants of their eligibility for the Earned Income Tax Credit. Certain low income wage earners (those with a “qualifying child”) may be entitled to advance payment of the credit. The ISO must therefore comply with all EIC notice requirements (See Appendices X.3, X.5, X.7, X.8 for IRS instructions and publications regarding the EIC) and must also be prepared to calculate and advance the credit to an employee who is eligible and who submits Form W-5 asking for advance payment (See Appendix IX.6). The amount advanced may be deducted from the employment tax withheld for that employee. The income countable for purposes of the credit (whether paid in advance or not) is the employee's total expected annual income. The intermediary, in these situations, is far better situated than the individual consumer to be able to determine whether or not the attendant's total yearly income would make him or her eligible for the credit.

Interviews with program administrators indicated that states and their contracted vendors were just beginning to grapple with the practical and administrative implications of administering the EIC, (in particular the advance payment aspect of the law). The program administrator for the State of Michigan was aware of the issue and reported that the state (as employer/agent under Revenue Procedure 80-4) was working on better ways of informing attendants of their potential eligibility for the EIC. This administrator was aware that there is a notice concerning the EIC on the back of Form W-2, but noted that only a few attendants had made inquiries about the applicability of this credit. Program administrators in Washington State had received only one inquiry about the EIC from an attendant, but were nonetheless consulting with regional IRS offices in Seattle to devise a way of handling such requests efficiently from the standpoint of the employer/agent ISO.

²⁴ The Social Security Administration (SSA) is aware of the problem and has issued an advisory letter entitled “Common Pay Agent” requiring that intermediaries issue separate W-2 reflecting only the wages paid on behalf of an individual consumer. State program administrators have objected to this proposal and its status remains unresolved at this time. For the text of the letter, see Appendix VIII.

Best Practice Suggestions for Administering Earned Income Credit

Public and private entities acting as ISOs must find appropriate ways of handling the earned income tax credit, particularly in terms of giving notice and calculating advance payments where applicable. If the ISO is preparing the employment tax filings on behalf of consumers, the ISO should give the appropriate notices and determine employees' eligibility. ISOs using the quarterly filing method (IRS Form 941) and reporting program wages for all attendants participating in the program may be better situated than an individual consumer to determine whether the employee is eligible for the credit in terms of income and other criteria. However, administrators must be sure that even if consumers are filing and paying employment tax at the end of the year (using Schedule H attached to Form 1040) that they or the ISO give employees notice of the Earned Income Credit.

f. What is the Tax Status of Co-Payments or Additional Payments to Attendants Made by Consumers?

There are at least two occasions when a consumer may make additional out-of-pocket payments to their attendants. The first is when a CD-PAS program uses a sliding fee scale where the consumer, depending on his or her income, is required to pay a copayment for CD-PAS received. The second is when a consumer makes additional out-of-pocket payments to his or her attendant in addition to the hourly wage established by the CD-PAS program in order to compete for qualified attendants or to retain an attendant who might otherwise leave. All such payments (if not strictly proscribed by program rules specifying that the rate is full payment for the services) should be included in the calculation of any income for purposes of FICA and FUTA/SUTA thresholds (and, of course, for income tax purposes). None of the states studied in this project identified this as an issue for individual consumers or for ISOs, nor had any state developed policies and procedures for keeping track of such payments for tax accounting purposes.

Best Practice Suggestions for Managing Copayments and Additional Payments Made by the Consumer

The entire amount of an employee's wages must be included in tax calculations and reported on the proper form. If the program has a sliding scale of consumer contributions, the additional amounts paid by the consumer must be added to the wages when figuring the income subject to tax. If the consumer pays his or her attendant(s) amounts in excess of the state's stated attendant wage or amounts that are not part of an authorized sliding scale contribution, ISOs may find it difficult to track and incorporate such payments. Therefore, these payments should be discouraged.

g. How Should “Stipends” be Treated for Tax Purposes?

Most CD-PAS programs pay personal care attendants on an hourly basis. However, some programs (such as adult foster care) pay the attendant/provider a lump sum on a monthly basis to provide personal care to a consumer. When the consumer is living in the attendant’s/provider’s home (such as in the case of adult foster care), the stipend received by the attendant/provider is excluded from the attendant’s gross income under Section 131 of the Internal Revenue Code (“Difficulty of Care Payments”). But no such favorable treatment exists for payments to attendants if the consumer lives in his or her own home. CD-PAS program staff from two programs, the New Hampshire Personal Care Attendant Program and the Idaho CD-PAS program, believe that the current rules effectively limit the consumers’ choice regarding where they can live, especially those consumers who prefer to live in their own homes. These program administrators believe that the tax status of these stipends favor caregivers who serve the consumer in their homes and create a disincentive or barrier for consumers who prefer to receive PAS in their own homes.

There are two other technical issues that need to be addressed related to stipends. First, in some states a stipend can include funds to cover respite care for the primary attendant/provider. These funds are not tax exempt. The attendant/provider then takes these funds and hires and pays the respite worker. Some state Divisions of Employment Security (SUTA) have examined the FUTA/SUTA tax payment histories of these respite workers and have found many of them not to be in compliance. In some cases the Division collects 10 percent of the stipend each month until the taxes are paid in full.

Second, in some states the consumers pay their adult foster care providers a monthly payment to cover their share of room and board from their personal resources (such as SSI/SSRI). These funds are not tax exempt and attendant/providers must report them as miscellaneous income annually on their IRS 1040 and state income tax forms. Failure to do so will result in the attendant/provider being out of compliance with state and federal income tax rules.

Best Practice Suggestions for Implementing Stipends

CD-PAS program and ISO administrators should make sure to review IRS income and employer tax rules before implementing stipends and room and board payments to make sure that all applicable taxes are paid timely and in full.

III. Department of Labor Rules Affecting CD-PAS Programs

A. Overview

Previous studies of federal labor laws affecting CD-PAS programs have identified a number of important requirements for program administrators to consider and incorporate in the design and rules pertaining to their state and/or Medicaid-funded CD-PAS programs. This study's analysis is based on the findings and recommendations contained in these studies, updated to include recent communications from tax and labor authorities as well as reports from the fields as to current policies and practices of CD-PAS programs that use ISOs.

As discussed previously in this report, personal care attendants (PCAs) are classified as domestic servants under the Department of Labor's (DoL) Fair Labor Standards Act (FLSA). This section will address minimum wage and overtime rules outlined in FLSA as they pertain to domestic servants, two exemptions to the federal minimum wage and overtime rules as they pertain to companions and live-in help, payment for night attendants and OSHA related issues.

B. Minimum Wage and Overtime Pay

Minimum wage and overtime requirements are set (as a floor) by FLSA and states may have stricter requirements of their own (e.g., the federal minimum wage is currently \$5.15/hour, whereas Massachusetts' minimum wage rate is \$5.25/hour). There is no federal requirement to pay overtime for time worked on weekends and holidays, nor if more than the usual number of hours are worked on a given day in the work week as long as the employee works no more than 40 hours in a week. However, employers must pay at least the federal minimum wage. If the employee works more than 40 hours in a single week, the employer must pay overtime (one and one-half times the minimum hourly rate paid to the employee for each additional hour worked). PAS attendants appear to be covered by the FLSA unless the services they provide can be characterized under two exemptions: (1) *companionship* services or (2) *live-in help* services. These exemptions now exist in federal law, but may not necessarily be followed by all states as state DoL law may be more beneficial to the worker.

No CD-PAS program examined in this study had a compliance issue related to paying PAS attendants the federal minimum wage.²⁵ In fact, in all cases where the federal minimum wage applied, programs paid in excess of the federal minimum wage (See Appendix V.1, Exhibit F).

²⁵ At the time the study was being conducted, the federal minimum wage was \$4.25/hour.

Regarding the payment of overtime, only five (22 percent) of the 23 CD-PAS programs studied reported that they paid PAS attendants overtime pay.²⁶ It should be noted, however, that the CD-PAS programs that did not pay overtime were most likely not out of compliance due to the fact that the majority of the PCAs working in these programs would qualify as *companions* under FLSA’s *companionship services for the aged or infirm exemption* which insulates the consumer/employer from paying minimum wage and overtime. However, very few CD-PAS program and ISO administrators interviewed knew of the DoL *companionship services* and *live-in help* exemptions, their effect on the payment of minimum wage and overtime for PCAs, nor did they know that the PCAs participating in the programs may well have qualified for these exemptions. Instead, CD-PAS program and ISO administrators gave other reasons for not paying overtime rates of pay to PCAs.

In some cases, such as New Hampshire’s Medicaid Personal Care Assistance Program, attendants are not allowed to work more than a total of 40 hours in a given week, eliminating the need for overtime pay. In the case of the Michigan Home Help Program, program administrators discourage PAS attendants from working more than 40 hours to prevent worker “burn-out” and the deterioration of the quality of PAS. In New York, the Concepts of Independence Program relies on a state labor law that precludes paying overtime to this category of worker. However, this state labor law could easily be superseded by a ruling in a worker challenge that finds this state law inconsistent with FLSA. Because so many state program administrators were unaware of the application of these DoL exemptions and their possible application to PAS attendants, a full discussion of these exemptions appears below.

C. Companionship Exemption

From the description of the duties of the attendants in all of the CD-PAS programs studied, it appears that an argument can be made that the work of most, if not all, PCAs would qualify as *companionship service* under the terms of 29 CFR 552.6, *companionship services for the aged or infirm*. This regulation specifies that the term applies to “services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs.” The regulation goes on to state that such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes and other similar services.” The regulation further states that such services may “*also* include the performance of general household work” provided that such work is “incidental” (i.e. does not exceed 20 percent of the total weekly hours worked). The use of the word *also* in this context seems to suggest that there is a difference between “household work” and “general household work”

²⁶ Maine’s Medicaid Elderly and Adults with Disabilities Waiver Programs, Maine’s Home-based Care Elderly and Other Physically Disabled Programs and the Georgia Division of Rehabilitation Services Independent Living Program.

since the sentence using the term “household work” does not contain any limitation whatsoever, whereas the sentence using the term “general household work” limits such work to 20 percent of the total hours worked per week.

The regulations note that services to this same population which “require and are performed by trained personnel such as a registered or practical nurse” cannot be embraced within the scope of the exemption. Again, this requirement would not affect personal care attendants, who are not “trained personnel” within the meaning of the regulation. The duties they perform are not “required to be performed by trained personnel.” The fact that trained professionals may also perform such duties does not mean that such duties may not be performed by the personal care attendant. Consumers and attendants interviewed reported that these are duties which are performed by the attendant acting as an extension of the consumer, “another pair of hands”, as one attendant put it. Unless state nurse practice acts are amended to take such duties out of the purview of personal care attendants and place them exclusively within the jurisdiction of licensed or registered nurses, the companionship exemption should insulate consumers/employers from the overtime requirement for the small number of attendants who put in more than forty hours a week for an individual consumers.²⁷

One program studied (GA Medicaid Independent Care Waiver Program) included both a companion and PCA option. The companion performed only basic household tasks, whereas the PCA performed personal care, health maintenance and household tasks. Companions were reimbursed \$15,000/year plus room and board, whereas, PCAs were reimbursed \$6-8/hour. It is difficult to compute an hourly wage for companions working in this program since their hours varied and often they did not work a traditional 40 hour week.

D. Live-In Help Exemption

Attendants who reside in the household where they are employed are exempt from the overtime provisions of the Fair Labor Standards Act by virtue of Section 552.102. However, they must be paid the minimum wage for each hour worked unless they are classified as “companions.” Most attendants do not live in the household of their employers.

²⁷ Even though reported cases reflect this interpretation of the law and find that the companionship exemption insulates employers from the payment of overtime for this class of workers, some believe that the law should be changed to clarify any ambiguities and effectively eliminate this exemption so that personal care attendants would earn overtime. Judge Pregerson, dissenting in the Oregon case of *McCune v. Oregon Senior Services Division*, 894 F. 2d 1107 (9th Cir. 1990), cited by Sabatino and Litvak in their 1995 paper, argued that the decision reached by the majority (holding for the employer) was ill-advised. Judge Pregerson believed that the term “companion” was not intended to include persons who provided medical care or who did substantial household work, but rather only to those who were merely there to “watch an older person.” (894 F. 2d at 1111). This interpretation, however, is not reflected in the plain language of the regulation. Moreover, it is established that attendants do not provide “medical care.”

However, some attendants in the CD-PAS programs studied did. For example, GA Medicaid Independent Living Program, the Maine Medicaid Elderly Waiver Program and the HCB Elderly and Other Physically Disabled Programs use the live-in help category. However, Health Resources of Maine (HRM), Inc., the ISO for a number of the Maine programs, is phasing out its live-in provision due to wage issues raised by the state's Division of Employment Security.

E. Provision for Night Attendants

Some attendants work in the consumer's household throughout the night. The attendant may be asleep for part of each night shift. It is common practice to pay such attendants a lump sum per night for that shift. According to DoL rules, that lump sum amount, divided by the total hours the worker is on duty, must yield the allowable minimum wage per hour because federal labor regulations specify that sleep time for employees working less than a 24 hour shift is compensable as long as the person is on duty (29 CFR 785.21). A number of CD-PAS programs reviewed utilized night attendants. These individuals were paid a lump sum amount that ranged from \$9.00 to \$15.70/night (See Appendix V.1, Exhibit F). Since it could not be discerned how many "sleep" hours were computed into these rates, it is difficult to determine whether the CD-PAS programs were in compliance with DoL rules. However, it is very important for CD-PAS program and ISO administrators to make sure that the night rates paid to PCAs are in compliance with the DoL rules pertaining to this work category.

F. OSHA

In 1970, the Occupational Safety and Health Act (OSH ACT), 19 U.S.C. 651 et seq. was enacted with the goal of providing American workers with a safe and healthful work place. Pursuant to the OSH Act, the Occupational Safety and Health Administration (OSHA) was created as an agency of the Department of Labor to monitor and enforce work place safety and health.²⁸ The OSHA issues that particularly apply to CD-PAS programs and PCAs are the regulations on ergonomics (e.g., transferring techniques), infectious diseases and blood borne pathogen control. In cases where a state had a mandatory training requirement for PCAs and when a CD-PAS program used the Agency with Choice ISO model, PCAs received training on OSHA related issues. However, when there was no mandatory state PCA training requirement and/or the consumer was the employer of record and responsible for training his or her attendant, PCAs received less training regarding OSHA related issues. The debate continues regarding the provision of mandatory basic PCA training. However, there is an argument in favor of requiring all PCAs to receive

²⁸ Wayne, Richard, D. (1991). *One Lawyer's Guide to Effectively Dealing with the Occupational Safety and Health Administration and Their Attorneys* in How to Help Your Clients When OSHA Comes Calling, edited by Jerrold Solomon, Massachusetts Continuing Legal Education, Inc., Boston, MA.

some type of basic training in order to protect the health and safety of both the consumer and his or her PCA.

Best Practice Suggestions for Labor Related Issues

State CD-PAS program and ISO administrators, and CD-PAS consumers, (particularly those who manage all of the employer-related tasks for their attendants), must be aware of the provisions of the federal Department of Labor's *Fair Labor Standards Act* (FLSA) regarding domestic service employees (including PAS attendants), including the exemptions for *companion* and *live-in* staff and the provision for *night attendants*. Moreover, they must be aware of any additional state DoL rules that differ from the federal rules in order to be in full compliance with state and federal DoL rules related to FLSA. CD-PAS program and ISO administrators should also assess the feasibility of using the *companion* and *live-in* exemptions when designing their CD-PAS programs in order to take advantage of any cost efficiencies related to exemptions for these worker categories.

IV. States Worker's Compensation and Disability Insurance Laws and Their Effect on CD-PAS Programs

A. State Worker's Compensation Insurance Law

Worker's compensation insurance laws are state laws that establish basic *quid pro quo* programs. Under worker's compensation laws, an employee agrees to relinquish his or her right to sue his or her employer for damages arising from injuries on the job in return for receiving prompt payment of benefits related to medical care and loss of income due to an injury on the job. Each of the 50 states, the District of Columbia, Puerto Rico and the Virgin Islands has a worker's compensation program. However, some states provide small employers exemption from otherwise applicable worker's compensation laws. For example, in Missouri, employers need not pay worker's compensation insurance benefits if they have fewer than four employees, whereas in New Jersey, an employer of even a single employee must provide worker's compensation insurance benefits.

State worker's compensation insurance laws place the responsibility for compliance on employers. Since many ISOs are not the employer of record of the attendant, they have no duty to arrange or pay for a worker's compensation policy to cover consumers' PAS attendants. Notwithstanding the lack of legal duty to provide this benefit, twelve (52%) of the 23 CD-PAS programs reviewed provided worker's compensation insurance coverage to PCAs. The ISO model most likely to offer this benefit was the agency with choice ISO (See Appendix V.1, Exhibit G). It should be noted that the State of Maine made the policy decision to provide worker's compensation insurance coverage for PCAs in all of its state and Medicaid-funded CD-PAS programs (with the exception of its cash benefit HBC

Physically Disabled and Voucher Programs) so that attendants would receive a basic level of benefits (e.g., FICA, FUTA/SUTA and worker's compensation insurance).

The number of worker's compensation claims reported by CD-PAS program and ISO administrators in this study was extremely low. Only one worker's compensation case was reported in the three states' CD-PAS programs reviewed that used an IRS/EA Fiscal ISO Model and one from the nine CD-PAS programs reviewed that used an Agency with Choice ISO model. One reason given was that the majority of attendants had not experienced a work-related injury. Another reason given was that many PCAs did not have the knowledge or the financial resources to file a claim. A third reason given was that the consumer's income and assets were very low, making any efforts to file a claim against the consumer not worthwhile. However, when an Agency with Choice ISO was the employer of record of the PCA, even though few claims were filed, there was considerable apprehension about the potential cost implications of such claims.

The State program administrator for the Michigan Home Help Program reported one case related to worker's compensation. In this case, a PCA filed a claim and the court ruled that the State was the employer of record for the purpose of paying worker's compensation benefits. The State responded to this decision by covering the PCA's medical expenses through the State's Medicaid program without claiming federal matching funds for the related expenses. This case did not lead to subsequent cases and the state currently does not extend worker's compensation insurance benefits to PCAs.

The Area Agencies on Aging (AAAs) in Maine historically were the ISO for three of the state's CD-PAS programs. As a result of the filing of a worker's compensation by a CD-PAS attendant, the AAAs' experience rating increased, causing the price of a worker's compensation insurance policy to increase. A number of AAAs decided not to continue to serve as ISOs and the state subsequently decided to contract with Health Resources of Maine (HRM), Inc., to be an agency with choice ISO for these programs. Currently, HRM, Inc. offers worker's compensation insurance benefits to its PCAs and a number of AAAs subcontract with HRM for PCA services for their clients.

B. State Disability Insurance Law

Five states -- California, Hawaii, New Jersey, New York and Rhode Island -- and Puerto Rico have statutes establishing state disability insurance programs.²⁹ Under such laws, employees and, in most cases, employers must pay a special tax to fund the program or pay for private insurance coverage that meets state requirements (Sabatino and Litvak, 1995).

²⁹ Sabatino and Litvak (1995), p.54.

Generally, disability insurance programs are coordinated with a state’s worker’s compensation and/or unemployment insurance programs, so in most cases, both taxes or premiums are paid at the same time under the particular state statute’s definition of “employer” and “employee.” In general, employment paying less than \$1000 in wages in a calendar quarter is exempt, although some states have lower dollar-amount thresholds. In New York, employers of domestic workers in a private home need not pay temporary disability benefits tax unless they have employed one or more workers for forty hours per week for at least four weeks, and at least thirty days in the calendar year.³⁰ Of the twenty-three CD-PAS programs studied, only the New York Concepts of Independence Program is obliged by state law to provide disability insurance to its PCAs and the program is in full compliance with this state law.

Best Practice Suggestions Related to Worker’s Compensation and Disability Insurance Law

CD-PAS program administrators, ISO administrators and consumers, (particularly those who manage all of the employer-related tasks related to their attendants), must be aware of any state statutes for worker’s compensation and disability insurance and the scope of these statutes in order to make sure the CD-PAS program and its participants are in full compliance with state law. Moreover, where the laws do not apply, CD-PAS program administrators may wish to consider the positive implications of offering such benefits, such as allowing consumers to recruit quality attendants and to avoid any cases where a even an inappropriate claim by an attendant may result in the state being considered the attendant’s employer by an administrative law judge or even a court of law.

V. Verifying Citizenship or Legal Alien Status

A. Overview

Employers, including employers of domestic workers (e.g., personal care attendants), must verify and maintain records (e.g., completed INS Form I-9) showing that each employee hired after November 7, 1986, is a U.S. citizen, a national of the U.S., or a legal alien who is authorized to work in the U.S.

The employment verification process requires that an employer have the worker complete and sign the Immigration and Naturalization Service (INS) Form I-9 within three business days from the date of hiring. The worker must show the employer both identification and employment eligibility documents from an approved list detailed on Form I-9. After examining the documents, the employer completes the employer’s section of the Form I-9. If the worker cannot provide the documents in three days, he or she must provide proof of

³⁰ Ibid.

application for the documents within the three days and the actual documents within 90 days of hire. The completed Form I-9 is not filed with the government; rather, the employer keeps it as an employment record for at least three years after the date of hiring or one year after the employment is terminated, whichever is later.

The obligation doesn't apply to *casual employment*, which is defined as including "employment of individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent." However, these terms are not further defined in regulation (Sabatino and Litvak, 1995).

Failure of an employer to comply with the verification and record keeping requirements can result in fines ranging from \$100 to \$1000 for each violation. Moreover, an employer who hires a person known to be an unauthorized alien can be punished by a fine of \$250 to \$2,000 for the first offense, with higher fines applicable to subsequent offenses, and criminal penalties if convicted of a "pattern or practice" of knowingly hiring illegal aliens (Sabatino and Litvak, 1995).

All of the CD-PAS programs studied were in full compliance with the Immigration Reform and Control Act of 1986 and the regulations regarding the employment verification process. However, CD-PAS program and ISO administrators should make sure this process is in place when designing a CD-PAS program and that there is full compliance when the program is operational.

Best Practice Suggestions Regarding Verification of Citizenship or Legal Alien Status

CD-PAS program and ISO administrators and consumers (particularly those that manage all the employer-related tasks for their attendants) should obtain and become familiar with a copy of the Immigration Reform and Control Act of 1986, Public Law 99-603, 8 USC Section 1324 (1994). Moreover, whoever is responsible for the verification process (e.g., state IRS Employer Agent ISO, Vendor Fiscal ISO, Agency with Choice ISO or Spectrum ISO or consumer) should be able to perform all the necessary verification tasks and have a place to store the related documentation safely for the required amount of time.

CHAPTER FOUR

The Effect of State Nurse Practice Acts on the Development of CD-PAS Programs

I. Introduction: Nurse Practice Acts and CD-PAS Programs Design and Philosophy

A. *Relationship of Nurse Practice Acts to CD-PAS Programs*

Nurse practice acts are state laws that govern the profession of nursing. These acts define the practice of nursing, set educational standards for nurses and set forth licensing standards for the profession. They may also cover the relationship of the nursing profession to other health professions and will usually specify what steps will be taken if someone is found to have engaged in the practice of nursing without having obtained a license. Part of the research in the eleven states in this study consisted of collecting information about the impact of nurse practice acts on the design, administration and implementation of CD-PAS programs with intermediary service organizations (ISOs).³¹

Most states' nurse practice acts were drafted decades before the concept of consumer-directed personal services developed as a program philosophy and service paradigm. Kane et al. (1995) observe that nursing "policy and regulations did not anticipate the possibility that a large number of individuals unrelated to the consumer, and not licensed as nurses, might have a role in providing routine nursing services."³² As discussed below, even though nurse practice acts purport to address only the practice of nursing, the scope of the terms "nursing" or "practice of nursing" as used in these acts may profoundly affect the consumer's ability to employ an individual not licensed as a nurse to serve him or her. Unless specifically modified to take into account the desire of consumers to use unlicensed personnel at home or at work to assist them in a variety of tasks, nurse practice acts may therefore conflict, or appear to conflict, with CD-PAS program design, goals and philosophy.

The purpose of this Chapter is to discuss the issues raised by state nurse practice acts, and to make recommendations based on findings from interviews with program administrators and personnel from Boards of Nursing. A detailed description of the findings from the eleven state study is found in Appendix XIII. Charts depicting exemption and delegation provisions in these states are found in Appendix XIV. This analysis is enriched

³¹ States nurse practice acts were not the primary focus of the study. However, one section of this study's interview guide was devoted to nurse practice issues. For a discussion of the different states nurse practice acts examined in this study, see Appendix XIII.

³² Kane, R., O'Connor, C. and Baker, M., "Delegation of Nursing Activities: Implications for Patterns of Long-Term Care," AARP Public Policy Institute #9515, November, 1995 at 2.

by material from earlier studies of the issues, including a comprehensive study by Sabatino and Litvak (1995) and a study by Rosalie Kane and her colleagues (1995) surveying delegation practices in twenty states. This area of the law is currently in considerable flux as policymakers in many states have begun to reexamine nurse practice laws (and other licensing and certification laws) in light of evolving concepts about service design, cost and philosophy in programs for persons with disabilities.

B. CD-PAS Attendants and Nurse Practice Acts

1. Who are CD-PAS Attendants and What Tasks do They Perform?

CD-PAS attendants may be young, old, family members, friends, skilled or relatively unskilled. Some may be certified to perform certain services (e.g. as certified nurse assistants or CNAs); others lack any formal credential. But whatever their individual characteristics and skill levels might be, PAS attendants are *not* licensed or registered nurses. They are called variously (depending on the state) home care workers, private duty homemakers, home health aides, in-home care providers, chore workers or auxiliary workers. A number of states (e.g., Nebraska and Missouri) use the general term “unlicensed assistive personnel” to describe any non-professional, unlicensed attendant performing services in the home of the consumer.

The CD-PAS attendant is, above all, someone chosen by the consumer to meet his or her *individualized* service needs. There is no single set of services that fits every individual with a disability. Flexibility is a hallmark of consumer-directed personal assistance programs: the attendant performs whatever personal assistance services are needed to allow the consumer to live at home, go to school or go to work just as an able-bodied person might. No one consumer is like any other: each has individual service needs and specific preferences regarding the type of caregiver and the type of care to be received, including needs and preferences that are related to the maintenance of health and physical condition. The question of whether or not such services can be performed *only by a nurse* is therefore one of great moment for any consumer who wishes to have such service performed by an unlicensed personal care attendant.

2. Tasks Performed by CD-PAS Attendants that May Potentially or Actually Conflict with Nurse Practice Acts or Regulations

Just as the names for these attendants vary from state to state, so do the skill or training requirements for such attendants.³³ There is also considerable variation in the list of tasks program designers expect attendants to perform for consumers. Indeed, it is a

³³ See as to skill levels and training of direct care workers, Hewitt, A., Larson, S. and O’Neill, S., “*National Voluntary Credentialing for Direct Service Workers*,” Policy Research Brief, Center on Residential Services and Community Living, University of Minnesota, Volume 8, No. 2, July, 1996. The authors suggest that formal training and credentialing of direct service workers may lead to improved quality of life for those receiving the services from such persons.

cornerstone of the Independent Living Movement philosophy that the attendants' tasks are to be defined by the consumer and may include whatever personal services are needed to enable the consumer to live daily life, go to school and work. Of course, the more broadly the attendant's role is defined, the more likely it is that the attendant's job description may embrace tasks that may be thought to fall within the definition of "nursing" or "practice of nursing" as those terms are used in many of the nurse practice acts.

In a 1988 survey of one hundred thirty-three PAS programs in the United States, the World Institute on Disability (WID) found that many PAS programs offered assistance with services that nurses may also perform, depending on the scope of some of the terms used. The numbers of PAS programs offering these services show that so-called "health maintenance activities" commonly form part of the expected services of many PAS attendants. A 1990 WID survey and study of PAS programs³⁴ found assistance offered in proportions as follows:

- bowel and bladder care (73%)
- prosthesis assistance (66%)
- range of motion (63%)
- menstrual assistance (63%)
- foot care (63%)
- assistance with medications (57%)
- assistance with respiration (48%)
- assistance with catheterization (38%)
- assistance with injections (33%)

Citing this study in their 1995 analysis, Sabatino and Litvak note that is not clear whether any or all of these tasks, if performed by a PAS attendant, would be considered "nursing" care within the meaning of a given state's nurse practice act and regulations. Some of them more obviously fall within the meaning of such terms (e.g., assistance with injections; catheterization) and others might not, depending on what the attendant actually does (e.g., bowel and bladder care). However, in the absence of clear definitions and guidelines, there may be a potential conflict between nurse practice laws and the operation of a CD-PAS program any time a consumer's service needs require the attendant to provide services that relate to health. Two ways of resolving potential conflicts between CD-PAS program regulations and state nurse practice acts are discussed below.

³⁴ Sabatino and Litvak (1995) at 89, citing a study published by WID in 1991: Simi Litvak et al. Final Performance Report: New Models for the Provision of Personal Assistance Services, Appendix C: Source Book of Case Study Information (Oakland: WID, 1990)

II. Exemption and Delegation Under Nurse Practice Acts: Implications For CD-PAS Programs

A. *Exemption and Delegation: Two Approaches to Reconciling Nurse Practice Acts with CD-PAS Program Goals*

Even at the time most nurse practice acts were written, legislative drafters saw the need for exceptions to prevent these statutes from having an impact beyond the intended area of regulation. Thus, many states created specific exemptions or exceptions that put certain *persons* (by exemption) or *conduct* (if the task is delegated by a licensed professional) outside the scope of the statute. The older exceptions reflect the drafters' awareness of the types of other caregivers and other caregiving situations that existed at the time that these acts were drafted; the newer exceptions have been crafted with specific programs in mind, including CD-PAS programs in some cases.

In their comprehensive survey of nurse practice acts, Sabatino and Litvak (1995) list the common exceptions to nurse practice acts that could be construed to apply to CD-PAS attendants and the services they perform. These are exceptions for: (1) care provided by friends and family; (2) care provided by domestic servants; (3) domestic administration of family remedies; (4) care provided by an employee of an institution; (5) care provided under the direction of a registered nurse (commonly referred to as “delegated” care) and (6) care under the order of a licensed physician or other personnel. Of these, all but the fifth (delegated care) excepts a specific *class of persons*, rather than allowing the *conduct* itself.

The distinction between exemption and delegation can be important in terms of defining the issues which confront policymakers seeking to design effective, workable CD-PAS programs. When it is the *conduct* which is permissible because a nurse has *delegated* the performance of the task to another (such as a PAS attendant), a multitude of questions arise, of which the following³⁵ are but a partial list:

- Is the nurse permitted under the statute to delegate the task?
- To whom is it lawful to delegate?
- Is the person to whom the task was delegated competent to perform the task?
- Under what conditions can the unlicensed person perform the task?
- Does the condition of the patient permit delegation or does the law restrict delegation only to cases where the patient was “stable” or had “predictable health care needs”
- What tasks may be delegated?

³⁵ Examples based on questions pursued in the survey by Kane et al. (1995) on nurse delegation. See Kane, Appendix A (“Guiding Questions”).

- May delegation be general or categorical or must some tasks be delegated only on a patient or task-specific basis?

If, on the other hand, a *person* or *class of persons* is *exempt* from the regulatory limitations of a state's nurse practice act, there are still a host of questions to answer, but they differ from those arising under *delegation*. They concern, among other things, (a) the scope of the exemption (i.e. does it fit the activities of the PAS attendant?) and (b) the application of other laws and rules that may still regulate services or assistance related to health (such as specific rules on administration of medication not codified in the nurse practice act itself).

B. Which is the Better Approach for CD-PAS Programs: Exemption or Delegation?

To begin with, it must be recognized that policymakers may not have a choice of which route to pursue to resolve potential conflicts between nurse practice acts and CD-PAS program design. Many states have already chosen a particular method of reconciling actual or potential conflicts between nurse practice acts with rules governing programs using unlicensed personnel. Idaho, for example, has chosen to deal with its unlicensed assistive personnel by delegation and has struck a successful balance between the licensing laws and the requirements of a service program that must extend into every corner of a state with many rural districts and serve consumers of widely varying abilities and conditions. Pennsylvania, on the other hand, considered delegation, developed proposed regulations and then decided to defer implementation, relying instead upon an exemption. New York has also resolved potential controversies through a specific exemption. A full discussion of the specific approaches taken by the states in this study is found in Appendix XIII. Charts depicting the characteristics of states' exemption or delegation rules are found in Appendix XIV.

If policymakers still have a choice, there is a good deal to be said in favor of creating a well-designed exemption for consumer-directed personal service attendants. A simple, narrowly drafted exemption such as New York State's (See discussion in Appendix XIII) insulates the CD-PAS program from future regulatory changes initiated by licensing boards. It lays to rest issues such as the uncertainty over what tasks may and may not be performed by unlicensed assistive personnel and/or the conditions of performance. It saves the cost of administering delegation rules, which often require considerable record-keeping, professional nurse time, and the time of the attendant (for training, demonstration of competence). Finally, the exemption for CD-PAS programs supports the goals of independence and individual choice (including the choice of attendant and services) that are central to the Independent Living philosophy.

However, legislative exemptions may not be as easy to obtain as changes in nurse practice or licensing regulations, depending on the process in the individual state. Moreover,

an exemption covering only CD-PAS programs leaves other groups still subject to the licensing laws, creating a distinction which some might see as unfair. Some statutes allow exemptions only if the person performing the services is not compensated. This means those who can be served by family members and friends need not be concerned about the licensing laws, but those who must pay for services must either employ a nurse directly or accept services only if there has been formal delegation. One interviewee observed that the distinction between paid and unpaid attendants disfavors publicly-aided consumers, whose attendants must be compensated. Where delegation is permitted, such individuals could be served by attendants to whom a nurse has delegated the performance of tasks falling within the definition of nursing. If the statute does not permit delegation of nursing tasks and no exemption is available, the program is faced with the risk of noncompliance.³⁶

Other arguments put forward in favor of delegation stress the relationship of delegation to quality services. Proponents of delegation argue that exempting unlicensed assistive personnel from the licensing laws may result in the program's losing an opportunity to improve the quality of service available to consumers, maintaining that quality of care can be enhanced if nurses become involved in providing instruction and oversight. Nurses' contribution may be lost or diminished if an exemption insulates the program from participation by nursing professionals. Future studies of this complex issue in the different states over the years will provide evidence on this point. At the moment, it is hard to judge exactly how the quality of CD-PAS programs will be affected by participation or lack of participation by registered or licensed nurses because there is no one definition of program quality that all advocacy groups can agree on. One indirect effect on quality which might result from ongoing discussions about nursing delegation might be an increased effort to certify or credential personal care attendants. Delegation may boost this effort because of nurses' reluctance to delegate nursing tasks to untrained individuals.³⁷ Findings from this study suggest that in states where delegation is allowed, there are stricter training or certification requirements for attendants than in other states. This trend is likely to continue.

³⁶ The Medicaid program has solicited comment with regard to a proposed rule which would explicitly eliminate the requirement for nursing supervision of personal care services. Under the same proposal states would be given flexibility to "determine, through development of provider qualifications, which individuals are qualified to provide personal care services." The proposed rule limits state flexibility to the extent that it prevents spouses, parents and step-parents of minors from providing personal care services. The proposed rule is silent on the question of whether some personal care services fall within the definition of nursing as set forth in state nurse practice acts. Proposed amendments to 42 CFR Part 440. Federal Register, Vol. 61, Number 47, March 8, 1996. The final rule has not been adopted yet, but it is believed that the final rule may include a provision specifying that any conflict between program regulations and state definitions of "nursing" or "nursing practice" is to be resolved with reference to individual states' nurse practice acts.

³⁷ Nurses' reluctance is particularly to be expected where the statute makes the nurse responsible for any bad outcomes associated with the delegation.

Proponents of delegation emphasize lower cost, equity, increased efficiency and choice. The cost arguments favoring delegation compare the cost of service as delegated by nurses to assistive personnel with the costs incurred by the program if the nurse provided the service directly. However, as compared to outright exemption of CD-PAS attendants from the licensing laws, implementing nurse delegation will probably add to program costs, especially where delegation protocols involve strict requirements for supervision, record-keeping, evaluation and monitoring. The choice argument made by proponents of delegation is linked to the cost argument: lowering program costs means that individuals can live in the setting of their choice. The strength of this argument depends on a comparison between costs of residential long term care and the costs of living in the home and receiving services from assistive personnel to whom nursing tasks have been delegated. In terms of this comparison, choice is indeed increased. However, the greatest amount of consumer choice occurs in situations where the chosen attendant is also free of the training, monitoring, evaluation and record keeping requirements that are features of many delegation protocols.

Nonetheless, delegation works well in a number of states and may work successfully in others. Good delegation protocols take considerable time to develop and require the cooperation of many individuals with diverse interests. If policymakers prefer to choose this approach to harmonizing the licensing laws with CD-PAS program requirements, there are many advantages, not the least of which is the lessening of uncertainty about the application of these laws to personal care attendants. If possible, the scope of the activities should be narrowly defined so that the statute does not inadvertently sweep in routine services under the definition of nursing. Policymakers should also consider the impact of proposed delegation protocols on cost and program administration. Finally, policymakers choosing this approach should think carefully about the impact of proposed delegation protocols on CD-PAS program goals and philosophy before they sit down to participate in the large task forces that are usually gathered to draft these statutes. Nothing is more difficult than trying to write regulations to implement an ill-conceived statute. Appropriate goal setting, planning and thinking ahead will save trouble later by ensuring a workable and sensible law from the start.

CHAPTER FIVE

Effective Use of Contracts to Facilitate the Operation of CD-PAS Programs

I. Introduction: Use of Written Contracts Helps CD-PAS Programs Achieve Their Objectives

Well-designed CD-PAS programs emphasize both the independence desired by the consumer as well as the responsibilities that go with the increase in independence and authority. Study of the different models of CD-PAS programs using ISO, sought to discover, among other things, whether, and how, contracts apportioning the rights and duties of intermediary, consumer and attendants facilitated these multi-party relationships. The study revealed considerable variation in the scope and subject matter of the contracts examined. However, it did appear that the very process of expressing rights, duties, responsibilities and expectations on paper was generally beneficial in helping the parties achieve the balance between independence and responsibility that worked best for all.

Discussions and examples suitable for the different ISOs are found in Appendix XV. The following is a brief discussion of the nature of contracts and why they are important in facilitating CD-PAS.

II. Using Contracts in CD-PAS Programs

A. *What is a Contract?*

Simply put, a contract is an “agreement between two or more persons or parties to do or not to do something” (Webster’s Third International Dictionary). Contracts are sometimes referred to by other terms (e.g., “memorandum of understanding”; “agreements”), but whatever they are called, a contract exists when two or more parties agree to do something (or to refrain from doing something). In the context of this report, the model contracts described are documents which express the intent of parties participating in a consumer-directed personal service program with intermediary support. These are complex relationships involving multiple parties and inter-related duties and responsibilities.

B. *Why Are Written Contracts Necessary?*

Most contracts are expressed in written form, although not all are. The more complex the relationship, the more important it is to express the parties’ promises to one another in writing. Moreover, if a contract is to be relied on when a dispute arises as evidence of what the parties expected from one another, it is obviously better to have the agreement expressed in writing.”

A well-drafted written contract achieves its objectives by:(1) expressing the expectations of the parties clearly; (2) reflecting the current state of the law that governs the relationship of the parties and (3) correctly apportioning responsibility and liability. Where multiple parties are involved, with different duties and expectations for each party, it is well worth the time to put the contract into words.

C. Who Should Sign the Contract?

The contract should be signed and dated by the parties making the promises. Most contracts are two-party contracts (e.g., consumer-attendant; consumer-intermediary; state-intermediary). Thus, the contract between a consumer and an attendant should be signed by both the consumer and the attendant. The signature indicates that the person signing is making a formal promise. It is helpful to have the signature line preceded by a clause reciting that the person signing has read and understood the terms of the agreement. Contracts need not be witnessed to be valid.

Even though there are only two formal parties to most CD-PAS agreements, it is helpful for each contract, agreement or written policy to reference the roles of other parties in the CD-PAS relationship. Contracts and policies should cross reference each other where necessary and should be drafted so that they are mutually consistent. If, for example, the consumer-employer uses an intermediary to perform payroll functions and comply with regulations, the consumer's contract with the *attendant* should specify that these employer functions are the responsibility of the *intermediary*, and not the *consumer*. The attendant is thus put on notice that questions arising from this aspect of the employment relationship are to be handled by the intermediary and not the consumer, whereas supervision and control of the day to day work is to be handled solely by the consumer.

D. What are the Important Matters that Should be Covered in CD-PAS Contracts?

In general, every contract governing a CD-PAS relationship (e.g., consumer-attendant; consumer-intermediary) should cover the following broad areas:

- Purpose of the contract or agreement;
- Roles of the parties;
- Qualifications of the parties (including any representations about skills and abilities);
- Duties/tasks to be performed by parties;
- Tasks specifically not to be part of contract or agreement;
- Wages and benefits (for contracts with attendants) including disclaimer or notice of benefits *not included* in the total compensation package;

- Administrative fee (e.g., for contracts between state and vendors);
- Conduct constituting breach, including language that addresses:
 - consequences of breach: discipline or termination (attendants)
 - standards that must be met (state with vendors);
- Termination and/or Modification of Contract; and
- Term of the Contract.

E. Must All Aspects of the CD-PAS Relationship be Described in a Written Contract?

There are many aspects of the CD-PAS relationship that might benefit from being expressed in writing, but not all need be detailed in a formal contract. It is helpful, for example, to list consumer preferences regarding how specific tasks should be done. One consumer interviewed drew up such a list. She gives it to all potential attendants so that they can decide if they can meet her expectations. The advantage of such a list is that it can be modified easily, whereas modification to a contract requires the consent of both of the parties.

Other matters that are helpful to put in writing, but which need not be part of a written document include, whom to contact in an emergency and procedures to follow in the event that the consumer is hospitalized or becomes temporarily unable to direct his or her attendant.

III. Conclusion

Contracts that clearly spell out the duties, rights, responsibilities and expectations of the parties to these new and evolving relationships facilitate the efficient operation of CD-PAS programs that use ISOs. Although it takes time to draft a good contract, this is time well-spent that can do much to anticipate and avoid future problems. Although no contract model fits all of the CD-PAS program relationships, a number of models are offered in Appendix XV, along with a discussion of their merits.

CHAPTER SIX

How Well Do the Various ISO Models Assist State Program Administrators in Designing and Implementing CD-PAS Programs and Consumers in Using CD-PAS?

I. Overview

This study has demonstrated the utility of employing various models of intermediary service organizations (ISOs) to improve the delivery of CD-PAS services to persons of all ages with disabilities and chronic conditions. However, no ISO model is optimal for every CD-PAS consumer. This is because, as in the general population, the characteristics of persons with disabilities vary from person to person. The two principal consumer characteristics CD-PAS administrators must focus on when designing CD-PAS programs are the (1) consumer's *desire* and (2) *ability* to perform the wide range of employer-related tasks associated with CD-PAS. This study examined the effectiveness of six ISO models in balancing individual consumers' desire and ability to perform the CD-PAS employer-related tasks independently with the states' desire to provide appropriate PAS to beneficiaries while ensuring regulatory compliance, program accountability, quality PAS and consumer health and safety.

Each ISO model was evaluated in terms of its performance related to specific evaluation criteria. These were access, program and cost efficiency, compliance/accountability, degree of consumer-direction afforded to consumers and level of administrative responsibility for the consumer.

Tables 2 and 3 illustrate these points graphically. Table 2 shows which models are likely to meet the needs of consumers with varying levels of desire and ability related to CD-PAS. Table 3 depicts the six models of ISOs and how they performed with respect to the evaluation criteria used in the study.

The remainder of this Chapter describes the performance of each of the ISO models examined based on the study's evaluation criteria and contains recommendations for optimal design and implementation strategies for CD-PAS program administrators.

II. Fiscal Conduit ISO

A. Overview

A consumer participating in a CD-PAS program that uses a Fiscal Conduit ISO typically is the employer of record of his or her attendant(s). The consumer (or surrogate) is solely responsible for all employer-related tasks. He or she may or may not wish to receive

Table 2
Use of ISO Models by Level of Consumer Ability and
Desire to Manage CD-PAS Related Tasks

Consumer Ability	Hi ↑	IRS/EA Fiscal ISO or Vendor Fiscal ISO with Supportive ISO	Fiscal Conduit ISO with Supportive ISO
	Lo	Agency with Choce ISO that offers various levels of consumer direction and supportive intermediary	IRS/EA Fiscal ISO or Vendor Fiscal ISO with Supportive ISO
		Lo	Hi →
		Consumer Desire	

Table 3
Performance of Six Models of Intermediary Service Organizations (ISO)
Based on Six Evaluation Criteria

Intermediary Service Organization (ISO)	Level of Consumer Access to CD-PAS	CD-PAS Program Efficiency	CD-PAS Program Efficiency
Fiscal Conduit ISO	Tends to limit access to CD-PAS to self-directed consumers who exhibit a high level of desire and ability to perform the employer functions. The availability of consumer-employer skills training will increase access. (+)	Can significantly limit state's administrative responsibilities related to the operation of the CD-PAS program. (+++)	Can be the most cost effective for states if ISO contracts and fees are effectively negotiated by the state. (+++)
IRS Employer Agent ISO	Increases consumer access to CD-PAS over the FC ISO model by performing the payroll function for consumers. (++)	Affords states the high level of responsibility and oversight. However, the need to create dual systems may introduce significant inefficiencies. (+)	Can be the least cost efficient for states due to states' difficulty achieving efficiencies with existing state personnel and resources. (+)
Vendor Fiscal ISO	Increases consumer access to CD-PAS over the FC ISO model by performing the payroll function for consumers. (++)	Can limit the state's administrative responsibility related to the operation of the CD-PAS program. (++)	If states negotiate ISO contracts and fees effectively, this ISO model can be very cost efficient. (++)
Agency with Choice ISO	Can offer the highest level of access to the broadest range of consumers, depending on the number and type of employer tasks performed by the ISO for consumers. (+++)	Allows for the coordination of all CD-PAS program functions and responsibilities within one entity. However, this can vary by ISO. (++/+++)	The level of cost efficiency achieved by this ISO model depends on the type of entity (CIL vs. HH Agency) and on the state's ability to effectively negotiate contracts and fees. (+/++)
Supportive ISO	Support services, in particular, consumer-employer skills training and attendant recruitment assistance can enhance access to CD-PAS for a broad range of consumers. (++)	Program efficiency can be enhanced depending on how supportive services are bundled and whether or not services are provided by a stand-alone entity or incorporated in an ISO. (+/++)	The level of cost efficiency achieved re: supportive services depends on the corporate structure delivering the services, the type of services provided, how they are bundled, and how effective the state is in negotiating contracts and fees. (+)
Spectrum ISO	Can offer the highest level of access to the broadest range of consumers, depending on the number and type of intermediary services available to consumers. (++/+++)	Program efficiencies related to this ISO model depend on the entity's organizational structure and the number of subcontractors. (+/+++)	The level of cost efficiency can vary for this ISO model, depending on the ISO's organization and the number of subcontractors used. (+/++)

- Continued -

Table 3
Performance of Six Models of Intermediary Service Organizations (ISO)
Based on Six Evaluation Criteria (continued)

Intermediary Service Organization (ISO)	Regulatory Compliance and Program and Fiscal Accountability	Level of Consumer Direction Afforded to CD-PAS Consumer	Level of Consumer Responsibility
Fiscal Conduit ISO	Regulatory compliance and program & fiscal accountability can be extremely variable and problematic under this model. Mandatory consumer-employer skills training addresses some of these problems. (+)	Offers consumers the highest level of consumer-direction and control. (+++)	The consumer is the legal employer of his/her attendant(s) and manages all employer related functions. (+++)
IRS Employer Agent ISO	Regulatory compliance and program and fiscal accountability is improved over the FC ISO model because the state is managing the payroll function for the consumer. (++)	Provides consumers with a high level of consumer-direction while managing the payroll function for consumers. (++)	Reduces the level of responsibility for consumers by managing the payroll functions. The consumer is the legal employer of their attendant. (++)
Vendor Fiscal ISO	Regulatory compliance and program and fiscal accountability is improved over the FC ISO model because the ISO is managing the payroll function for the consumer. (++)	Provides consumers with a high level of consumer-direction while managing the payroll function for consumers. (++)	Reduces the level of responsibility for consumers by managing the payroll functions. The consumer is the legal employer of their attendant. (++)
Agency with Choice ISO	Regulatory compliance and program and fiscal accountability is highest in this ISO. However, a state still must monitor agency performance. (+++)	Can vary significantly in the level of consumer-direction afforded to consumer dependency on ISO's commitment to consumer direction. (+/+/+/+++)	Can impose the lowest level of employer responsibility, but this can vary by type of ISO used (CIL vs. HH Agency). (+/+/+++)
Supportive ISO	Supportive services, particularly consumer-employer skills training enhances consumers' compliance with regulatory and program mandates. (++)	Supportive services, particularly consumer-employer skills training can enhance consumers compliance with regulatory and program mandates. (++)	Supportive services may or may not reduce the level of consumer responsibility, but will enhance consumers' ability to manage the required employer responsibilities. (+/+/+++)
Spectrum ISO	Regulatory compliance and program/fiscal accountability is high in this model because a broad range of assistance is available to consumers. (+/+/+++)	Offers consumers the full range of consumer-direction, however, the level can vary based on ISO's commitment of consumer-direction principles. (+/+/+++)	Affords consumers a variety of employer responsibilities (low to high) depending on the ability and desire of the consumer. (+/+/+++)

supportive services (such as employment tax and payroll management training) to perform these functions. In the three study states that used a Fiscal Conduit ISO (i.e., Massachusetts' Medicaid Personal Care Attendant Program, Maine's Home Based Care (HBC) Physically Disabled Program, and the cash option of Pennsylvania's Attendant Care Program), supportive services were available. Moreover, in the case of the Maine and the Massachusetts CD-PAS programs, consumers were required to successfully complete CD-PAS skills training in order to participate in the program. Supportive services were provided using two distinct ways. In the case of Maine and in some cases in Pennsylvania, a separate Supportive ISO (i.e., a Center for Independent Living) provided the services. In the case of Massachusetts, the fourteen "PCA Agencies" provided both the fiscal and the supportive intermediary services.

B. Access, Level of Consumer-Direction and Responsibility

Almost by definition, a Fiscal Conduit ISO is best suited to self-directing consumers who exhibit a very high level of desire and ability because this ISO offers consumers the maximum amount of choice and control. Two of the three programs studied (i.e., Maine and Pennsylvania) required consumers to be self-directing to be eligible for the CD-PAS program. As a result, such a program tends to have a limiting effect on access. For example, there are only 135 consumers participating in the Maine HBC Physically Disabled Program and only a handful currently participate in the Pennsylvania's cash option program. Initially, Massachusetts enrolled only self-directing consumers in its PCA Program. However, in 1981, the State expanded program eligibility to persons with both physical and mental disabilities (Nadash and Flanagan, 1996). As a result, program enrollment soared to the current level of approximately 3,700 consumers. A variety of issues developed related to program accountability, quality of PAS and consumer health and safety and program administrators now express doubt that all consumers currently enrolled are equally capable of meeting the demands of the program. As a result, Medicaid PCA program staff are in the process of revamping the current CD-PAS program to introduce greater administrative control than has been available through the Fiscal Conduit ISO model.

C. Program and Cost Efficiency, Compliance and Accountability

Efficient Fiscal Conduit ISOs can limit the state's administrative tasks and the associated costs of the CD-PAS program. The greatest cost efficiencies are achieved by states who know what they wish to purchase from Fiscal Conduit ISOs and have several potential contractors bidding to provide the designated services. Contracting with a small number of qualified vendors enables the state CD-PAS program agency to be able to effectively monitor vendor performance. For example, Massachusetts contracts with 14 Fiscal ISOs whereas, Maine contracts with only one. When the Maine contract for the Fiscal Conduit/Fiscal ISO for three CD-PAS programs recently went out for rebid, the state had little choice in selecting vendors since only the current Fiscal ISO (i.e., Alpha One)

submitted a bid. However, CD-PAS program staff in Massachusetts reported significant variability in the fourteen PCA agencies' performance and ability to meet state program requirements. By contrast, Maine CD-PAS program staff noted that an advantage of having one vendor was, "that you can know every detail of their operation and monitoring their performance closely." This same level of vigilance is often necessary to monitor ISOs' commitment to consumer-direction, which is the keystone of CD-PAS programs.

Although it was not possible to cost out all the administrative fees that were paid to three states' ISOs in a standardized manner in order to compare these fees across CD-PAS programs, the per diem rates of the PAS provided by CD-PAS programs that used Fiscal Conduit ISOs and related supportive services in the aggregate were lower than the average per diem rates of payment established by the study states for Medicaid home health and related personnel.

In the Fiscal Conduit ISO model, compliance with all regulatory requirements is left to the consumer (or the surrogate in the case of Massachusetts) who may not or may receive supportive services to assist with these tasks. The downside of this practice is that, if enough consumers fail to properly discharge their responsibilities, regulatory authorities will seek to hold the state accountable even though the consumer is the employer of record and the state is not. For example, in Massachusetts the State's Division of Employment Security (DES) has had cases where PAS attendants (considered independent contractors in the state) have filed for unemployment insurance benefits. In such cases, DES has challenged the independent contractor status and looked for some entity to pay the back unemployment insurance tax. Realizing that consumers seldom, if ever, have these monies, DES would like to look to the state to pay these taxes since they are the original source of the funds. To date, the state has not made any back payments related to unemployment insurance tax. However, DES is trying to determine what the employer-employee relationship for these cases will be in the future and who should be responsible for these tax payments.

Conclusions and Recommendations Regarding Fiscal Conduit ISOs

Fiscal Conduit ISOs work "best" when (1) participating consumers have a high level of desire and ability, (2) consumer employer training is made available to consumers, and (3) when there are strong oversight policies and procedures in place to monitor consumer compliance with employer mandates and program regulations, and to assure that Fiscal Conduit ISOs remain faithful to the consumer-directed principles and the Independent Living philosophy.

III. IRS Employer Agent Fiscal ISO

A. Overview

Three of the eleven states studied have implemented the IRS Employer Agent Fiscal ISO model to enhance their CD-PAS program: Idaho, Michigan and Washington State. In all three cases, the choice of this ISO model was urged upon the states by regional IRS officials in order to resolve pending cases related to employer tax compliance. All three states were persuaded to become agents for eligible consumers under the terms of IRS Revenue Procedure 80-4 to ensure future years' employment tax compliance. As in the Fiscal Conduit ISO model described earlier, the consumer is the employer of record of his or her attendant(s). As the employer, the consumer may appoint an agent for purposes of preparing employment tax filings. This agent may be public (state agency) or a private vendor. In states, (including the three studied), that use an IRS Employer Agent Fiscal ISO, the state agency itself is the ISO. The states, therefore, enjoy the maximum level of administrative and program control in this ISO model. However, this same level of control increases the risk that the state may be perceived as the responsible party in any employment related dispute even though the consumer is the employer of record. Although this ISO model offers fiscal and administrative services, none of these states provided supportive services to consumers participating in the CD-PAS program other than a basic program orientation.

B. Access, Level of Consumer-Direction and Responsibility

CD-PAS programs that use IRS Employer Agent Fiscal ISOs can serve a broader range of consumers (e.g., those with high ability and low desire or low ability and high desire) than CD-PAS programs using a Fiscal Conduit ISO because this ISO performs the most challenging employer-related task: managing the payroll (i.e., FICA, FUTA/SUTA, and any benefits) and issuing paychecks for attendants while providing consumers with a high level of consumer-direction. For example, a consumer may have a high ability to perform the necessary employer-related tasks, but may be employed or attending school and not have the time available to manage these additional tasks. Another consumer may have a developmental disability that has prevented him or her from having extensive life experience in home finance and/or employee management, yet may have a great desire to participate in a CD-PAS program. By providing the appropriate fiscal services, this ISO model affords such consumers the opportunity to participate in a CD-PAS program, thereby increasing program access while maintaining a high level of consumer choice and control. It should be noted that all three states that use Fiscal IRS Employer Agent ISOs allowed consumers with surrogates to participate in the CD-PAS programs, providing greater access to consumers than programs or ISOs which do not allow use of a surrogate.

C. Program and Cost Efficiency, Compliance and Accountability

Where the state itself is the Fiscal ISO, fiscal accountability is assured. More problematic is the issue of cost efficiency. None of the three states examined could give an estimate of the costs associated with performing the ISO functions. Moreover, it is uncertain whether states can achieve cost efficiencies through the use of existing state personnel and systems.

With regard to program efficiency, two of the three states reported encountering difficulties arising from operating dual payroll systems: one for persons employed directly by the state and the other for persons employed by program beneficiaries (i.e., Idaho, Michigan). In particular, Michigan and Idaho found that issuing an IRS Form W-2 for each consumer-PCA relationship was a great burden and therefore, are currently issuing one Form W-2 per attendant listing total program wages, contrary to current IRS rules. This practice, while administratively efficient for the ISO, may confer Social Security credits to noneligible attendants (e.g., those earning less than \$1,000/year). Washington State, on the other hand, made the investment to develop a separate payroll system for managing CD-PAS attendants' reimbursement and has reported good results.

Conclusions and Recommendations Regarding IRS Employer Agent Fiscal ISOs

States that wish to implement the IRS Employer Agent ISO model need to examine their existing payroll and fiscal accounting systems to assess their ability to accommodate the separate accounting and regulatory requirements for CD-PAS attendants. If a state's current systems can not accommodate the new and required functions, a state needs to assess the financial and operational feasibility of developing the additional capabilities. Finally, if the systems modifications are not operationally and/or financially feasible, then the state should consider implementing a Vendor Fiscal ISO model.

IV. Vendor Fiscal ISO

A. Overview

Four of the twenty-three CD-PAS programs studied have implemented the Vendor Fiscal ISO model: Maine's Medicaid CD-PAS Program and the Medicaid Physical Disabled Waiver Program, Missouri's Personal Care Assistance Program and Virginia's Personal Assistance Services Program. This ISO model is similar to the IRS Employer Agent Fiscal ISO model in every respect except one: the ISO is a private vendor with which the state has a contract rather than the state agency being the ISO itself. In all four CD-PAS programs, the consumer is the employer of record and must be able to self-direct his or her own attendant(s) and services. The Vendor Fiscal ISO performs all payroll functions (including managing FICA, FUTA/SUTA and other benefits such as worker's compensation, where applicable) and check preparation and disbursement tasks as the agent of the consumer.

Therefore, the state CD-PAS program agency enjoys somewhat less control than if it performed these functions itself. However, what the agency loses in terms of direct control, it gains in terms of insulation from the reality and the appearance that it is the responsible party in any employment-related disputes arising between the consumer-employer and the attendant. The state may also achieve some administrative efficiency by using a Vendor Fiscal ISO.

B. Access, Level of Consumer-Direction and Responsibility

The level of access to the CD-PAS program for consumers is similar to that found in the CD-PAS programs that use the IRS Employer Agent Fiscal ISO. In both cases, allocating these administrative/fiscal tasks to the ISO means that consumers who have neither the desire nor the ability to perform these tasks can receive CD-PAS services without assuming this level of responsibility. At the same time, such consumers, who are the employers of record, can manage all other aspects of the employment relationship with their attendants (e.g., recruitment, hiring, training, managing and discharging attendants). It should be noted that all four CD-PAS programs that used the Vendor Fiscal ISO model restricted access to the program to self-directing consumers only, whereas the CD-PAS programs that used the IRS Employer Agent Fiscal ISO's allowed consumers with surrogates to participate. This one feature of these four CD-PAS programs could be seen as a possible limitation on consumer access. It may be that the requirement prohibiting surrogates was used as a "screen" to assure the state that the consumers participating were able to manage the requirements of participating in the CD-PAS program.

C. Program and Cost Efficiency, Compliance and Accountability

States in the study that used Vendor Fiscal ISOs reported that they achieve a high level of program efficiency by employing private vendors to administer the intermediaries services related to the CD-PAS program. By contracting with a vendor, these states were able to avoid the confusion (and related inefficiencies) that arose in states that performed these functions themselves. Moreover, states using contracted Vendor Fiscal ISOs were satisfied with the price paid for these services. In all cases studied, the total CD-PAS per diem rates, including the administrative costs associated with the Vendor Fiscal ISO and Supportive ISO, where applicable, were lower than the Medicaid rates of payment for home health aides and related personnel in each study state.

Although the various Vendor Fiscal ISOs used different methods to achieve compliance with regulatory requirements, all states reported a high level of satisfaction with the vendors' performance with regard to compliance. Even though the Vendor Fiscal ISOs were solely responsible for these important administrative tasks, the states studied all reported that they believed public funds were being responsibly administered and accounted

for. It appeared from interviews with program administrators that the surest way to achieve program accountability was to incorporate strong, testable performance standards in the vendors' contracts.

Conclusions and Recommendations Regarding Vendor Fiscal ISOs

Vendor Fiscal ISOs offer states many advantages in terms of administrative and cost efficiencies while reflecting a high level of consumer-direction for consumers. While the states that used this ISO model appeared to be reluctant to permit participating consumers to use surrogates, there is no reason why consumers with surrogates can not participate in a CD-PAS program that uses this type of ISO, provided that appropriate monitoring policies and procedures related to surrogates' performance are in place.

V. Agency with Choice ISO

A. Overview

Nine of the twenty-three CD-PAS programs studied used the Agency with Choice ISO model. In this model, the ISO is the employer of record of consumers' attendants and the consumer is the *managing employer*, often having the option to select, in some cases train, supervise and discharge his or her attendant(s). As the employer of record, the agency is responsible for the majority of the administrative and fiscal employer-related tasks. However, the number of tasks can vary significantly depending on the degree of consumer-direction and control permitted by the ISO to the consumer. For example, in most of the CD-PAS programs that use an Agency with Choice ISO, the consumer can refer an attendant for employment by the agency. However, according to a number of Agency with Choice ISOs interviewed, when the choice is given to a consumer to identify his or her own attendant, the consumer often reports that he or she doesn't have a candidate and so the ISO refers its own staff to the consumer for approval and then handles the majority of the employer-related tasks.

In contrast, consumers in the New York Concepts of Independence Program manage all employer-related tasks with the exception of managing payroll and preparing payroll checks for their attendants. In addition, once Concepts prepares an attendant's check, it is sent to the consumer to distribute even though the agency is the legal employer of the attendant. When consumers participating in the NY Concepts of Independence Program were asked what role Concepts had in managing their attendants, consumers reported that "Concepts is *just* my fiscal agent." Similar responses were recorded from the consumers who participated in the New Hampshire Medicaid Personal Care Assistance Program. These findings demonstrate that even though a CD-PAS program uses the Agency with Choice ISO model, the CD-PAS program can still offer a high level of consumer choice and control and its services can appropriately reflect the Independent Living philosophy.

B. Access, Level of Consumer-Direction and Responsibility

Access to CD-PAS programs was found to be greatest and the consumer population the most diverse (particularly in terms of age and type of disability) when the Agency with Choice ISO was used. The New Hampshire Self-Determination Project, administered by Monadnock Developmental Services in Keene, New Hampshire, found this model to be very effective in providing CD-PAS to persons with mental retardation and cognitive impairments. All of the CD-PAS programs, with the exception of the NY Concepts of Independence Program, allow consumers with surrogates to participate in the CD-PAS program and a number of states allow children and elders to participate (See Appendix V.1, Exhibit C). Moreover, Concepts of Independence is now developing the program capacity to allow consumers with surrogates to participate in the program. Agency with Choice ISOs afford consumers with little desire and/or ability to manage the employer responsibilities the option to assume the least number of employer-related administrative responsibilities, depending on the CD-PAS program and ISO (e.g., an elder who may wish to select his or her attendant and supervise his day to day activities in his or her home but have the ISO manage the other responsibilities).

However, the level of consumer-direction and commitment to the Independent Living philosophy can vary significantly from ISO to ISO under this model. This study found that Agency with Choice ISOs that were based in the traditional home health agency model often offered a lower level of consumer-direction than those that were Centers for Independent Living (CIL) based. The study also found that the greater the number of Agency with Choice ISO operational in a state, the greater the level of consumer-direction varied from ISO to ISO. Also, the greater the number of such ISOs, the more difficult it was for state CD-PAS program agencies to monitor the ISOs' commitment to the Independent Living philosophy and the level of consumer-direction afforded to consumers. For example, Pennsylvania has sixteen Spectrum ISOs operating in the state that offer a wide range of intermediary services including Agency with Choice. When a traditional home health agency-based ISO was interviewed, staff reported that "many of our consumers really don't want a lot of choice" and it was not clear what level of effort was made to encourage consumers to try a more consumer-directed option.

Finally, this study found that Agency with Choice ISOs that subcontracted with other agencies to provide PAS services also had difficulty monitoring subcontractors' commitment to consumer-direction. In Pennsylvania, an Area Agency on Aging (AAA), acting as a Spectrum ISO, subcontracted with local agencies to provide agency-based PAS to eligible consumers. One consumer interviewed used agency-based PAS exclusively and had no idea of the options available to her. When she (and her son who held a durable power of attorney) were asked if she would like to receive fiscal intermediary services and hire and manage her own attendants, they responded enthusiastically in the affirmative and asked why they were never told about this option before. The executive director of the

AAA, realizing that consumers were not consistently being informed of their intermediary service options, addressed the problem by actively advocating for and implementing a CIL in the area which would provide the fiscal and supportive intermediary services to eligible consumers in the area.

C. Program and Cost Efficiency, Compliance and Accountability

Overall, Agency with Choice ISOs ranked high regarding program efficiency. However, all ISOs studied, including Agency with Choice ISOs, that required consumers to establish and implement their own “back-up” plans for relief attendants, found that often consumers did not successfully manage this requirement. In the case of the Maine CD-PAS programs that HRM, Inc., administered, HRM staff reported that consumers were responsible for establishing and implementing their own “back-up” attendant relief plans “because it was a consumer-directed PAS program.” However, staff reported that often these plans did not work. This study recommends that CD-PAS programs revisit the issues of attendant relief and try to develop plans where the ISO and the consumer work together so that attendant relief can be accessed consistently by consumers.

Conventional wisdom would predict that Agency with Choice ISOs are the least cost effective of all the ISO models. However, this study found that this was not always the case. All of the CD-PAS programs in the study that used the Agency with Choice ISO had PAS per diem rates (including administrative fees) that were lower than the comparable Medicaid rates for home health aides and related personnel in each of the study states. In particular, NY Concepts of Independence administered the CD-PAS program, provided payroll services, an attendant search “hot-line,” consumer-employer training and provided attendants with a full range of benefits for \$10.98/hour, less than the average Medicaid home health aide per diem rate. Moreover, the program’s consumer population has a very high acuity level (Concepts serves a significant number of consumers who are quadriplegics on ventilators). This study found that when agencies were developed for the specific purpose of managing a CD-PAS program, state agencies could negotiate rates for program administration and PAS that were consistently more competitive than those of traditional home health agencies. This is true, in part, because the state did not have to compete with the rates of payment paid for home health aide services paid for by the Medicare program.

On the whole, Agency with Choice ISOs offer states a high degree of compliance with regulatory requirements and program and fiscal accountability. State program agencies can effectively monitor the administration of the program and the services rendered best when there are a limited number of agencies under contract. However, the level of consumer-direction afforded to consumers by these agencies can vary significantly, particularly when the primary ISO subcontracted with other agencies to provide PAS to eligible consumers.

Conclusions and Recommendations Regarding Agency with Choice ISOs

Agencies with Choice ISOs can offer states and consumers varied levels of consumer-direction depending on the type of consumers participating in the CD-PAS program and the ISO's commitment to consumer-direction and the Independent Living philosophy. Even if the ISO is agency-based, the ISO will not necessarily generate high administrative costs similar to traditional home health agencies. Proper rate negotiation by the state can result in this model being quite cost effective. Moreover, if the proper consumer-directed philosophy is followed in agency practice, this ISO model can potentially serve consumers with a broad range of ages and disabilities.

This study recommends that states using the Agency with Choice ISO model in the design of their CD-PAS program offer consumers varying levels of consumer-direction depending on the needs and desires of the consumer population. Moreover, states should consider allowing consumers to use an Agency with Choice ISO from time to time in order to purchase relief attendant services. Finally, this study recommends that state CD-PAS programs that use Agency with Choice ISOs develop performance standards that effectively monitor ISOs and their subcontractors' commitment to and application of consumer-direction principles.

VI. Supportive ISO

A. Overview

This study found that supportive intermediary services were provided either by a stand-alone Supportive ISO (i.e., the Maine HBC Physically Disabled Program the Medicaid CD-PAS and the Medicaid Physically Disabled Programs, the Missouri Personal Care Assistance Program and the Virginia Personal Assistance Services Program) or within the range of services offered by an ISO (i.e., the Massachusetts Medicaid Personal Care Attendant Program which is a Fiscal Conduit ISO or NY Concepts of Independence which is an Agency with Choice ISO). The supportive intermediary services offered to consumers in these CD-PAS programs were varied, ranging from the provision of consumer-employer skills training to assisting consumers with recruiting their attendant(s), evaluating consumers' needs for PAS and providing case management services (See Appendix V.2, Exhibit J). The study also found that Supportive ISOs that were CILs were the most effective in providing these services and advocating for the consumer regarding their CD-PAS (i.e., the Missouri, Virginia and Maine Programs).

B. Access, Level of Consumer-Direction and Responsibility

In general, the availability of supportive services, regardless of the ISO used, enhanced consumers' ability to participate successfully in a CD-PAS program, thus enhancing consumer access. CD-PAS programs that offered supportive services, (in particular, consumer-employer training), could afford consumers a high level of consumer-direction and help them better manage their CD-PAS responsibilities.

In the case of CD-PAS programs that used a Fiscal Conduit ISO, the availability of consumer- employer training was the key to consumers' success in the program. However, even with this training, the number of consumers participating in a CD-PAS program that used a Fiscal Conduit ISO with supportive intermediary services was small (i.e., the Maine Home Based Care Physically Disabled Program).

In all cases, consumers interviewed were reluctant to perform criminal background checks. This study recommends that a CD-PAS program's supportive intermediary services include assistance for the consumer in conducting and evaluating criminal background checks on their potential PAS attendants.

C. Program and Cost Efficiency, Compliance and Accountability

This study showed that supportive intermediary services provided by a separate Supportive ISO or within one ISO (i.e., a Fiscal ISO or an Agency with Choice) could be equally effective as long as the proper consumer-directed philosophy was applied by the ISO. This study found that supportive services administered by CILs were highly effective, possibly because of the CILs' commitment to the Independent Living philosophy.

Regarding cost efficiency, fees for supportive services tended to be unbundled (i.e., a rate for skills training, another for evaluating and reevaluating consumers' PAS needs) and fees varied significantly from ISO to ISO (See Appendix V.2, Exhibit K). This study recommends that state CD-PAS programs re-examine how they reimburse ISOs for supportive services and consider negotiating a bundled supportive service rate in order to give ISOs the incentive to provide supportive services as needed rather than to maximize program revenues.

This study found that the supportive services provided by the CD-PAS programs studied did enhance compliance and accountability, particularly for CD-PAS programs using the Fiscal Conduit ISO model.

Conclusions and Recommendations Regarding Supportive ISOs

Supportive services, whether offered by a “stand-alone” support agency or as part of an ISO’s service package, are highly effective in enhancing consumers’ access to and success with CD-PAS programs. The key to the effectiveness of these services seems to be the spirit in which the services are provided, not the institutional setting or organizational framework. If the provider of supportive services adheres to the Independent Living philosophy, consumers’ access to and participation in CD-PAS programs are enhanced. Fees do vary significantly and must be effectively negotiated and monitored in order for the state CD-PAS program agency to be a prudent buyer of these services.

This study recommends that supportive intermediary services include performance of the criminal background check on prospective attendants or include assistance to consumers to enable them to perform this task. The study also recommends that states develop global fees for a package of supportive services rather than purchasing each service separately.

VII. Spectrum ISO

A. Overview

One of the eleven study states operated a Spectrum ISO (i.e., Pennsylvania’s Attendant Care Program). This ISO in effect combines all of the different services offered by the various ISO models discussed above under one umbrella CD-PAS and ISO program. Once a consumer is determined to be eligible for CD-PAS, the consumer can choose freely among the ISO service options. A small number of consumers participate in the “cash” option. However, the state was not “promoting” this option. The remainder of the approximately 2,000 consumers participating in the Pennsylvania Attendant Care Program were directed to the Combination (Fiscal ISO) and Agency (Agency with Choice ISO) options due to the state’s concerns over the legal status of attendants and the concern that appropriate compliance with regulatory requirements were not being met. A goal of the Attendant Care Program is to make consumers “blind” to program funding sources so that the funding sources and eligibility process create a “seamless” PAS delivery system where consumers can be afforded the level of consumer-direction they desire. One consumer interviewed reported that “during the week I have to get to work on time so I use the attendant I recruited and use the Fiscal ISO option (combination). However, on weekends and holidays it is more difficult to access PAS attendants and my schedule is more flexible so I access attendants through the Agency with Choice ISO option.”

B. Access, Consumer-Direction and Responsibility

The Spectrum ISO studied appeared to afford a very high level of access and consumer-direction to consumers with a varying consumer desire and ability. However, the Pennsylvania Attendant Care Program has sixteen Spectrum ISOs throughout the state, some of which subcontracted with other entities for fiscal and supportive intermediary services and agency-based PAS. This study found that in the case where the Spectrum ISO

was not a CIL, consumers tended to rely heavily on agency-based PAS, accepting the personnel and services these agencies supplied. These consumers often were not fully aware of the options available to them and did not seem to know that they could assume a greater role in managing their own services. States that use multiple ISOs, no matter what type must be vigilant in monitoring these entities' commitment to and application of consumer-directed principles.

C. Program and Cost Efficiency, Compliance and Accountability

A Spectrum ISO may enhance program efficiency depending on the level of use of subcontracted services. Spectrum ISOs that manage the majority of the services under one umbrella organization (without the use of subcontracted services) must be capable of providing all of the intermediary service options and be well organized and capitalized in order to successfully offer the full range of services to consumers.

Whether or not the Spectrum ISO model is cost efficient depends on the negotiating abilities of the state CD-PAS program agency involved and the number of subcontractors used by the ISO. In the case of the Pennsylvania Attendant Care Program, Spectrum ISO fees varied from a maximum of ten percent of an agency's contract for programs funded through Act 150 funds to all inclusive hourly rates (including attendant wages) and a per month service fee for services funded with Medicaid waiver funds (See Appendix V.2, Exhibit K).

The level of compliance and accountability achieved by a Spectrum ISO is high because the design of the program allows consumers to move within the intermediary service options. For example, consumers who are unsuccessful managing their services under the "cash" option can be moved to the fiscal agent or agency with choice option as needed.

Conclusions and Recommendations Regarding Spectrum ISOs

Use of the so-called "Spectrum" ISO model permits a state to offer consumers a wide range of intermediary service options using a single umbrella organization. Thus, a state maintains control over the CD-PAS program and ISO design and philosophy, while at the same time, offers consumers a broad range of intermediary services to assist them in accessing and successfully participating in CD-PAS programs. This ISO model can eliminate the need for and the costs associated with multiple CD-PAS programs that use a variety of ISOs. It allows the state to develop a seamless CD-PAS service delivery model. The Spectrum ISO also allows consumers to access the intermediary services that meet their needs now and as their needs change.

Therefore, this report recommends that states consider implementing Spectrum ISOs when designing CD-PAS programs. The keys to a successful Spectrum ISO are: (1) good, testable performance standards in provider contracts, (2) a strong commitment from vendor ISOs (and any subcontractors) to the principles of consumer-direction and the Independent Living philosophy and (3) periodic monitoring and evaluation of Spectrum ISOs and their subcontractors.

Conclusions and Recommendations that Are Applicable Across All ISO Models

There are a number of conclusions and recommendations that are applicable to all ISO models. These include the following.

1. The most successful State-ISO contract relationships are forged when the state has a clear understanding of the services it wishes to purchase from an ISO.

Therefore, state CD-PAS program agencies should develop contracts with ISOs that clearly state an ISO's role, responsibilities and services. These contracts should include performance standards that can be used to assess an ISO's activities and its commitment to consumer-directed principles and the Independent Living philosophy.

2. Consumers's back-up plans for relief attendants frequently fail causing consumers to have a difficult time finding relief attendants over weekends, holidays and when the primary attendant is absent for any reason.

Therefore, state CD-PAS program agencies should develop a mechanism that facilitates consumers access to relief attendants, possibly through an arrangement with a Agency with Choice ISO or a Spectrum ISO that offers agency-based PAS.

3. Consumers are hesitant to initiate criminal background checks on prospective attendants because they do not know how to conduct them and they feel these checks adversely compromise the consumer-attendant relationship.

Therefore, state CD-PAS program agencies should develop a standard, user friendly system, implemented either by the state or an ISO, that either assists consumers in performing this task or directly conducts criminal background checks on prospective attendants for consumers.

4. The availability of supportive intermediary services varies by ISO model. However, some level of supportive services is key for consumers to successfully participate in a CD-PAS program.

Therefore, state CD-PAS program agencies should incorporate supportive intermediary services into their CD-PAS program no matter what other ISO model is used.

5. ISOs, and the agencies they subcontract with, vary in their commitment to consumer-directed principles and the Independent Living philosophy.

Therefore, states should develop performance standards in ISO contracts that address the ISO's and their subcontractors' commitment to consumer-directed principles and the Independent Living philosophy.

6. State nurse practice acts and their effect on CD-PAS programs vary from state to state.

Therefore, states should pursue exemptions to their nurse practice acts if possible, or should seek to develop protocols permitting delegation that are consistent with CD-PAS program goals and the Independent Living philosophy.

7. A number of states have considered personal care attendants to be independent contractors and some continue to consider them as such even though regulatory authorities have determined them to be *someone's employee*.

Therefore, states should design programs with mechanisms (including intermediary services) that assist consumers in complying with the IRS rules for household employees and avoid referring to personal care attendants as independent contractors.

8. A number of advocates and CD-PAS consumers expressed concern about the potential impact of managed care on the availability of CD-PAS to eligible consumers.

Therefore, state Medicaid managed care programs of the elderly and persons with disabilities should be designed to include and accommodate this important service option.

REFERENCES

_____(1994). "Background Paper on Personal Assistance Services and Related Supports," Prepared by the Office of Disability, Aging and Long-Term Care Policy in the Office of the Assistant Secretary for Planning and Evaluation, D.H.H.S., November 2, 1994.

Crown, W.H., (1994). "A National Profile of Homecare, Nursing Home and Hospice Aides," Generations, Fall; 18:3, 29-33.

DeJong, G., Batavia, A.F., and McKnew, L.B., (1992). "The Independent Living Model of Personal Assistance in National Long-Term Care Policy." Generations, Winter, 89-95.

DeJong, G., (1981). Environmental Accessibility and Independent Living Outcomes: Directions for Disability Program and Research. East Lansing, Michigan: Michigan State University, University Center for International Rehabilitation.

DeJong, G., (1979). "The Independent Living Movement: From Social Movement to Analytic Paradigm," Archives of Physical Medicine and Rehabilitation, 60: 435-446.

Doty, P., J. Kasper and S. Litvak, (1996). "Consumer-Directed Models of Personal Care: Lessons from Medicaid," Milbank Quarterly, vol. 74, no. 3, 377-409.

Doty, P., Kasper, J., and Taylor, H. (1994). "Consumer Choice and the Frontline Worker," Generations, Fall; 18:3, 65-70.

Doty, P., Kasper, J., Litvak, S., and Taylor, H. (1993). "Consumer-Directed Models of Personal Care: Lessons from Medicaid," Draft Paper.

Feldman, P.H., Sapienza, A.M., and Kane, N.M., (1994). "On the Home Front: The Job of the Home Aide," Generations, Fall; 18:3, 16-19.

Flanagan, S.A. and P.S. Green, (1996). "Briefing Paper on Internal Revenue Service (IRS) and Department of Labor (DoL) Issues Related to the Provision of Consumer-Directed Personal Assistance Services (CD-PAS) with Intermediary Service Organization (ISO) Models," prepared for the Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, by The MEDSTAT Group, Cambridge, MA August.

Flanagan, S.A., Green, P.S., and Eustis, N., (1995). "Background Paper: Facilitating Consumer-Directed Personal Assistance Services (CD-PAS)," prepared for the Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, Washington, D.C., by The MEDSTAT Group, Cambridge, MA.

Flanagan, S.A., (1994). "Consumer-Directed Attendant Services: How States Address Tax, Legal and Quality Assurance Issues," prepared for the Department of Health and Human Services, Office of the Assistant Secretary of Planning and Evaluation (ASPE), Division of

Aging and Long-Term Care Policy (DALTCP), April 28, 1994 by The MEDSTAT Group, Cambridge, MA.

Friedson, (1970). Professional Dominance: The Social Structure of Medical Care, Chicago, Ill, Aldine.

Gibson, Virginia, H., (1992). "Recent Trends in Worker's Compensation," Employee Relations, L.J., v.69, n.5, p.23(1).

Haddad, A.M., (1994). "Reading a Right and Good Decision: Ethical Decision-Making and the Frontline Worker," Generations, Fall; 18:3, 75-78.

Henderson, J.N., (1994). "Bed, Body and Soul: The Job of the Nursing Home Aide," Generations, Fall; 18:3; 20-22.

Hewitt, A., Larson, S., and O'Neill, S., (1996). "National Voluntary Credentialing for Direct Service Workers," Policy Research Brief, Center on Residential Services and Community Living, University of Minnesota, July; 8:2.

_____, IRS Revenue Procedure 70-6.

_____, IRS Revenue Procedure 80-4.

Kane, R., O'Conner, C., and Baker, M., (1995). "Delegation of Nursing Activities: Implications for Patterns of Long-Term Care," AARP Public Policy Institute #9515, November.

Linder, M., (1995). "What Hath Zoe Baird Wrought? The New FICA Amendments of Domestic Service Employees," Tax Notes, January 2, 113-118.

Linder, M., (1989). "The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion," Hamline Journal of Public Law and Policy, Vol 10, 321-345.

Litvak, S. (1990). "New Models for the Provision of Personal Assistance Service: A Research and Demonstration Project," World Institute on Disability and Bureau of Economic Research at Rutgers University.

Litvak, S., Zukas, H., and Heumann, J.E. (1987). Attending to America: Personal Assistance for Independent Living, Berkeley, California: World Institute on Disability.

Morrow, D., (1996). "Nanny-Tax of '95: Who Paid? Who Lied?," The New York Times, April 21.

Nadash, P. and S.A. Flanagan, (1996). "The Massachusetts Medicaid Personal Care Attendant (PCA) Program: Implications for Cash and Counseling," The National Institute of Consumer-Directed Long Term Services, Washington, D.C., December.

O'Neil, Cherie, J. and Linda Nelsestuen, (1993). "Distinguishing Independent Contractors from employees," Florida Bar Journal, March, v.67, n.3., p.47-51.

_____(1996). "Principles of Consumer-Directed Home and Community-Based Services: A Statement of the National Institute on Consumer-Directed Long-Term Services," National Council on the Aging, Inc., Washington, D.C., July.

Sabatino, C.P., and Litvak, S., (1995). "Liability Issues Affecting Consumer-Directed Personal Assistance Services, Report and Recommendations," prepared by C.P. Sabatino, J.D., of the ABA Commission on Legal Problems of the Elderly in collaboration with S. Litvak, Ph.D., of the World Institute on Disability (WID), under the sponsorship of the Retirement Research Foundation, July.

Sabatino, C.P., and Litvak, S., (1992). "Consumer-Directed Homecare: What Makes it Possible," Generations, Winter, 53-58.

Simon, N., (1996). "Legal Considerations in Hiring In-Home Caregivers," The Elder Law Report, May; VII:10.

Szabo, Joan, C., (1993). "Contract Workers: A Risky Business," Nation's Business, August, v.81, n.8., p. 20(6).

_____(1995). Unemployment Insurance Program Letter No. 19-95, a publication of the U.S. Department of Labor, Employment and Training Administration, March 8.

Wilner, M.A., (1994). "Working it Out: Supporting Groups for Nursing Assistants," Generations, Fall; 18:3, 39-40.