

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: April 18, 2018

AGENCY: MAP

FH #: 7741973P

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In the Matter of the Appeal of	:
	: <b>DECISION</b>
	<b>AFTER</b>
	: <b>FAIR</b>
	<b>HEARING</b>
from a determination by the New York City	:
Department of Social Services	:

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**JURISDICTION**

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on May 14, 2018, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Managed Long Term Care Plan (Centers Plan for Healthy Living)

On papers only – Centers Plan appearance waived by the Office of Administrative Hearings

**ISSUE**

Was the Appellant's Managed Long Term Care Plan's determination to deny a request for an increase in Personal Care Worker (PCW) services from 12 hours, 7 days per week to 24 hours, 7 days weekly continuous care by more than one personal care aide “split-shift”, correct?

**FINDINGS OF FACT**

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age 83 and who lives alone, has been enrolled in a Managed Long Term Care Program and has received care and services, including Personal Care Worker (PCW) services, through a Medicaid Managed Long Term Care Health Plan operated by Centers Plan for Healthy Living (“Centers Plan”).

2. The Appellant has been in receipt of a PCW services authorization in the amount of 12 hours, 7 days per week for a total of 84 hours weekly.

3. A request was made on behalf of the Appellant for increase in PCW services to 24 hours, 7 days weekly continuous care by more than one personal care aide “split-shift”.

4. On January 26, 2018, Centers Plan completed a Uniform Assessment System New York (UANSY) Assessment (Comprehensive) Report of the Appellant’s personal care needs and (UANSY) NF-LOC (Level of Care).

5. On April 7, 2018, Centers Plan completed a Uniform Assessment System New York (UANSY) Assessment (Comprehensive) Report of the Appellant’s personal care needs and (UANSY) NF-LOC (Level of Care).

6. By Initial Adverse Determination dated April 10, 2018, Centers Plan advised Appellant of its determination to deny a request for an increase in Personal Care Worker (PCW) services from 12 hours, 7 days per week to 24 hours, 7 days weekly continuous care by more than one personal care aide “split-shift” on the grounds that-

“The plan is taking this action based on the NYS Department of Health Uniform Assessment (UAS-NY) and the plan’s client tasking tool. A comprehensive NYS Department of Health Uniform Assessment System (UAS-NY) was conducted on 4/7/2018.”

7. On April 18, 2018, this fair hearing was requested on Appellant’s behalf, to review Centers Plan’s determination.

### **APPLICABLE LAW**

Regulations at 18 NYCRR 358-3.7(a) provide that an appellant has the right to examine the contents of the case record at the fair hearing. At the fair hearing, the agency is required to provide complete copies of its documentary evidence to the hearing officer. In addition, such documents must be provided to the appellant and appellant's authorized representative where such documents were not provided otherwise to the appellant or appellant's authorized representative in accordance with 18 NYCRR 358-3.7. 18 NYCRR 358-4.3(a). In addition, a representative of the agency must appear at the hearing along with the case record and a written summary of the case and be prepared to present evidence in support of its determination. 18 NYCRR 358-4.3(b).

Except as otherwise established in law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of Public Assistance, Medical Assistance, SNAP benefits or Services, the Agency must establish that its actions were correct. 18 NYCRR 358-5.9(a).

Part 438 of 42 Code of Federal Regulations (CFR) pertains to provision of Medicaid medical care, services and supplies through Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), Prepaid Ambulatory Health Plans (PAHPs) and Primary Care Case Managers (PCCMs), and the requirements for contracts for services so provided.

Section 438.210 of 42 CFR Subpart D provides, in pertinent part:

(a) Coverage - Each contract with an MCO, PIHP, or PAHP must do the following:

(1) Identify, define, and specify the amount, duration, and scope of each service that the MCO, PIHP, or PAHP is required to offer.

(2) Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under fee-for-service Medicaid, as set forth in Sec. 440.230.

(3) Provide that the MCO, PIHP, or PAHP--

(i) Must ensure that the services are sufficient in amount, duration, or scope to reasonably be expected to achieve the purpose for which the services are furnished.

(ii) May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the beneficiary;

(iii) May place appropriate limits on a service

(A) On the basis of criteria applied under the State plan, such as medical necessity; or

(B) For the purpose of utilization control, provided the services furnished can reasonably be expected to achieve their purpose, as required in paragraph (a)(3)(i) of this section; and

(4) Specify what constitutes “medically necessary services” in a manner that:

(i) Is no more restrictive than that used in the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures; and

(ii) Addresses the extent to which the MCO, PIHP, or PAHP is responsible for covering services related to the following:

(A) The prevention, diagnosis, and treatment of health impairments.

(B) The ability to achieve age-appropriate growth and development.

(C) The ability to attain, maintain, or regain functional capacity.

(b) Authorization of services . For the processing of requests for initial and continuing

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authorizations of services , each contract must require:

- (1) That the MCO, PIHP, or PAHP and its subcontractors have in place, and follow, written policies and procedures.
- (2) That the MCO, PIHP, or PAHP:
  - (i) Have in effect mechanisms to ensure consistent application of review criteria for authorization decisions; and
  - (ii) Consult with the requesting provider when appropriate.
- (3) That any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollee's condition or disease....

Section 438.236 of 42 CFR Subpart D provides, in pertinent part:

- (a) Basic rule: The State must ensure, through its contracts, that each MCO and, when applicable, each PIHP and PAHP meets the requirements of this section.
- (b) Adoption of practice guidelines. Each MCO and, when applicable, each PIHP and PAHP adopts practice guidelines that meet the following requirements:
  - (1) Are based on valid and reliable clinical evidence or a consensus of health care professionals in the particular field.
  - (2) Consider the needs of the MCO's, PIHP's, or PAHP's enrollees.
  - (3) Are adopted in consultation with contracting health care professionals.
  - (4) Are reviewed and updated periodically as appropriate.
- (c) Dissemination of guidelines. Each MCO, PIHP, and PAHP disseminates the guidelines to all affected providers and, upon request, to enrollees and potential enrollees.
- (d) Application of guidelines. Decisions for utilization management, enrollee education, coverage of services , and other areas to which the guidelines apply are consistent with the guidelines.

Section 438.400 of 42 CFR Subpart F provides in part:

- (a) Statutory basis. This subpart is based on sections 1902(a)(3), 1902(a)(4), and 1932(b)(4) of the Act.
  - (1) Section 1902(a)(3) requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.
  - (2) Section 1902(a)(4) requires that the State plan provide for methods of

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administration that the Secretary finds necessary for the proper and efficient operation of the plan.

(3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.

(b) Definitions. As used in this subpart, the following terms have the indicated meanings: In the case of an MCO or PIHP—"Action" means--

(1) The denial or limited authorization of a requested service, including the type or level of service;

(2) The reduction, suspension, or termination of a previously authorized service;

(3) The denial, in whole or in part, of payment for a service...

Section 438.402 of 42 CFR Subpart F provides in part:

(a) The grievance system. Each MCO [Managed Care Organization] and PIHP [Prepaid Inpatient Health Plan] must have a system in place, for enrollees, that includes a grievance process, an appeal process, and access to the State's fair hearing system...

Section 438.406 of 42 CFR Subpart F provides in part:

(a) General requirements. In handling grievances and appeals, each MCO and each PIHP must meet the following requirements:

(1) Give enrollees any reasonable assistance in completing forms and taking other procedural steps. This includes, but is not limited to, providing interpreter services and toll-free numbers that have adequate TTY/TTD and interpreter capability.

(2) Acknowledge receipt of each grievance and appeal.

(3) Ensure that the individuals who make decisions on grievances and appeals are individuals--

(i) Who were not involved in any previous level of review or decision-making; and

(ii) Who, if deciding any of the following, are health care professionals who have the appropriate clinical expertise, as determined by the State, in treating the enrollee's condition or disease.

(A) An appeal of a denial that is based on lack of medical necessity.

(B) A grievance regarding denial of expedited resolution of an appeal.

(C) A grievance or appeal that involves clinical issues.

(b) Special requirements for appeals. The process for appeals must:

(1) Provide that oral inquiries seeking to appeal an action are treated as appeals (to establish the earliest possible filing date for the appeal) and must be confirmed in writing, unless the enrollee or the provider requests expedited resolution.

(2) Provide the enrollee a reasonable opportunity to present evidence, and allegations of fact or law, in person as well as in writing. (The MCO or PIHP must inform the enrollee of the limited time available for this in the case of expedited resolution.)

(3) Provide the enrollee and his or her representative opportunity, before and during the appeals process, to examine the enrollee's case file, including medical records, and any other documents and records considered during the appeals process.

(4) Include, as parties to the appeal--

(i) The enrollee and his or her representative;

Section 4403-f of the Public Health Law pertains to Managed Long Term Care Plans.

Article 49 of the Public Health Law pertains to Utilization Review and External Appeal.

## **OBLIGATIONS OF THE CONTRACTOR**

### **A. Provision of Benefits**

1. The Contractor agrees to provide covered services set forth in Appendix G in accordance with the coverage and authorization requirements of 42CFR 438.210; comply with professionally recognized standards of health care and implement practice guidelines consistent with 42CFR 438.236; and comply with the requirements of 438.114 regarding emergency and post-stabilization services to the extent that services required to treat an emergency medical condition are within the scope of covered services in Appendix G.

2. Benefit package services provided by the Contractor under this Contract shall comply with all standards of the State Medicaid Plan established pursuant to State Social Services Law Section 363-a and shall satisfy all applicable requirements of the State Public Health and Social Services Law. Non-covered services for which the Enrollee is eligible under the Medicaid Program will be paid by the Department on a fee-for-service basis directly to the provider of service.

3. The Contractor agrees to allow each Enrollee the choice of Participating Provider of covered service to the extent possible and appropriate.

4. The Contractor agrees to maintain and demonstrate to the Department's satisfaction, a sufficient and adequate network for the delivery of all covered services either directly or through subcontracts. The Contractor shall meet the standards required by 42CFR 438.206 for availability of services ; and 42CFR 438.207 for assurances of adequate capacity; and applicable

sections of Public Health Law and regulations. If the network is unable to provide necessary services under this Contract for a particular Enrollee, the Contractor agrees to adequately and timely furnish these services outside of the Contractor's network for as long as the Contractor is unable to provide them within the network.

**Appeal** - a request for a review of an action taken by the Contractor.

Section B of Appendix K of the Managed Long Term Care Contract, provides in part:  
**B. APPEALS**

An Appeal is a request for a review of an action taken by a plan.

Expedited Appeal – the plan determines or the provider indicates that a delay would seriously jeopardize the enrollee's life or health or ability to attain, maintain or regain maximum function or the action was the result of a concurrent review of a service authorization request. A member may also request an expedited review of an appeal. If an expedited review is not requested, the appeal will be treated as a standard appeal.

Plans must designate one or more qualified personnel who were not involved in any previous level of review or decision-making to review the appeal, and if the appeal pertains to clinical matters, the personnel must include licensed, certified or registered health care professionals. The plan may deny a request for an expedited review, but it must make reasonable efforts to give oral notice of denial of an expedited review and send written notice within 2 calendar days of oral request. The appeal is then handled as a standard appeal. A member's disagreement with plan's decision to handle as a standard appeal is considered a grievance – see Grievance Procedures.

An appeal may be filed orally or in writing. If oral, the plan must provide the member with a summary of the appeal in writing as part of acknowledgement or separately. The date of the oral request for both standard and expedited appeals is treated as the date of the appeal.

Note: New York has elected to require that a member exhaust the plan's internal appeal process before an enrollee may request a State Fair Hearing.

Section 2 of Appendix K of the Managed Long Term Care Contract sets forth language relating to the managed long-term care demonstration grievance and appeal process which must appear in the Contractor's Member Handbook. This language includes:

***State Fair Hearings***

If we did not decide the appeal totally in your favor, you may request a Medicaid Fair Hearing from New York State within 60 days of the date we sent you the notice about our decision on your appeal.

If your appeal involved the reduction, suspension or termination of authorized services you are currently receiving, and you have requested a Fair Hearing, you may also request to continue to

receive these services while you are waiting for the Fair Hearing decision. You must check the box on the form you submit to request a Fair Hearing to indicate that you want the services at issue to continue. Your request to continue the services must be made within 10 days of the date the appeal decision was sent by us or by the intended effective date of our action to reduce, suspend or terminate your services, whichever occurs later. Your benefits will continue until you withdraw the appeal; the original authorization period for your services ends; or the State Fair Hearing Officer issues a hearing decision that is not in your favor, whichever occurs first.

Section 505.14(a)(1) of the Regulations defines "Personal Care Services" to mean some or total assistance with personal hygiene, dressing and feeding and nutritional and environmental support functions. Such services must be essential to the maintenance of the patient's health and safety in his or her own home...".

Section 505.14(a) of the Regulations provides in part that:

(2) **Some or total assistance** shall be defined as follows:

(i) **Some assistance** shall mean that a specific function or task is performed and completed by the patient with help from another individual.

(ii) **Total assistance** shall mean that a specific function or task is performed and completed for the patient.

(3) **Continuous personal care services** means the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted.

(5) **Live-in 24-hour personal care services** means the provision of care by one person for a patient who, because of the patient's medical condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night is infrequent or can be predicted.

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(6) Personal care services shall include the following two levels of care, and be provided in accordance with the following standards:

(i) Level I shall be limited to the performance of nutritional and environmental support functions.

Note: Effective April 1, 2011 Social Services Law §365-a(2)(e)(iv), which is reflected in this regulation, was amended to provide that personal care services pursuant to this paragraph shall not exceed eight hours per week for individuals whose needs are limited to nutritional and environmental support functions.

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(ii) Level II shall include the performance of nutritional and environmental support functions



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and personal care functions.

- (a) Personal care functions shall include some or total assistance with the following:
  - (1) bathing of the patient in the bed, the tub or in the shower;
  - (2) dressing;
  - (3) grooming, including care of hair, shaving and ordinary care of nails, teeth and mouth;
  - (4) toileting; this may include assisting the patient on and off the bedpan, commode or toilet;
  - (5) walking, beyond that provided by durable medical equipment, within the home and outside the home;
  - (6) transferring from bed to chair or wheelchair;
  - (7) preparing meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
  - (8) feeding;
  - (9) administration of medication by the patient, including prompting the patient as to time, identifying the medication for the patient, bringing the medication and any necessary supplies or equipment to the patient, opening the container for the patient, positioning the patient for medication and administration, disposing of used supplies and materials and storing the medication properly;
  - (10) providing routine skin care;
  - (11) using medical supplies and equipment such as walkers and wheelchairs; and
  - (12) changing of simple dressings.

Administrative Directive 12 OMM/ ADM-1 advised in relevant part that new language has been incorporated defining continuous personal care services and continuous consumer directed personal assistance as constituting uninterrupted care provided by more than one person to a consumer who requires total assistance with toileting and/or walking and/or transferring and/or feeding and which involves more than 16 hours of care per day during times that cannot be predicted or scheduled. The amended regulations also provide definitions of live-in 24 hour personal care services and live-in 24 hour consumer directed personal assistance, where no such definitions previously existed in regulation.

Specifically, the new definitions of continuous personal care services or continuous consumer directed personal assistance mean the provision of uninterrupted care, by more than

one person, for more than 16 hours per day, for a consumer who, because of his or her medical condition and disabilities, requires total assistance with toileting, transferring, walking or feeding at times that cannot be predicted or scheduled. As in the past, the consumer's need for assistance is not capable of being scheduled; that is, it occurs at times that cannot be predicted, which is the language used in the amended regulations.

"Total assistance" remains defined in the regulations as meaning that a specific function or task (for continuous care, the tasks of toileting, walking, transferring or feeding) is performed and completed for the patient.

In instances when continuous personal care services or continuous consumer directed personal assistance is being considered, the nursing assessment must determine and document that the consumer requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted or scheduled [§505.14 (b)(4)(i)(c)(2) and §505.28 (d)(3)(i)(g)].

Definitions of live-in 24 hour personal care services and live-in 24 hour consumer directed personal assistance have been added to the regulations [§505.14 (a)(5) and §505.28 (b)(8)]. This level of service has existed, but is now defined in the Department's regulations. Potentially eligible individuals must have a medical condition and disabilities (functional deficits) requiring some or total assistance with one or more personal care or CDPAP functions during the day and night and have a need for such assistance during the night that is infrequent or that can be predicted or scheduled. "Some assistance" remains defined in the regulations as meaning that a specific function or task is performed and completed by the patient with help from another individual.

The regulations require that, for recipients who may be eligible for live-in 24 hour services, the social assessment must include an evaluation whether the recipient's home has adequate sleeping accommodations for a live-in aide [§505.14 (b)(3)(ii)(c) and §505.28 (d)(2)(v)]. Examples of adequate accommodations include an available spare bedroom, room partition or a fold-out sofa. Availability of sleep-in space for the aide shall be determined on a case by case basis by the local district, taking into account the consumer's living situation. In determining the appropriateness of live-in 24 hour services, the local district should also assess whether the client can be safely left alone without care for a period of one or more hours per day.

The regulations promote the efficient use of resources designed to enhance the independence of individuals in support of their desire to remain in the community. To that end, the regulations require that personal care services and consumer directed personal assistance shall not be authorized if the patient's need for assistance can be met by:

adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, when such equipment or supplies can be provided safely, and, by promoting the consumer's independence in the home or other location, services provided would also be cost-effective; or

voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends or other responsible adult; or formal services provided by an entity or

agency. [§§ 505.14(a)(4)(iii) and 505.28(e)(1)]

With regard to adaptive or specialized equipment (the “efficiencies”), the nursing assessment shall include a professional evaluation whether such adaptive or specialized equipment or supplies can meet the recipient’s need for assistance and whether such equipment or supplies can be provided safely and cost-effectively when compared to the provision of aide services . Such adaptive or specialized equipment or supplies include, but are not limited to, bedside commodes, adult diapers, urinals, walkers and wheelchairs

[§§ 505.14(b)(3)(iii)(b)(5) and (b)(3)(iv)(a)(7)and §505.28(d)(3)(ii)(f)].

With regard to informal caregivers, such support cannot be required but should be evaluated and discussed with the patient and the potential caregivers.

General Information Service message GIS 97 MA 033 includes a reminder that the contribution of family members or friends (to the care of a Personal Care Services recipient) is voluntary and cannot be coerced or required in any manner whatsoever.

GIS message GIS 12 MA/ 026 advises that it is the Department’s policy that 24-hour split-shift care should be authorized only when a person’s nighttime needs cannot be met by a live-in aide or through either or both of the following:

(1) adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, wheelchairs, and insulin pens, when the social services district determines that such equipment or supplies can be provided safely and cost-effectively; and  
 (2) voluntary assistance available from informal caregivers or formal services provided by an entity or agency. When a person’s nighttime needs cannot be met by the use of adaptive or specialized equipment or supplies or voluntary assistance from informal caregivers or formal services , a determination must be made whether the person needs 24-hour split-shift care (included within the regulatory definition of “continuous personal care services”) or live-in 24-hour personal care services . Under Section 505.14, this depends on whether the person needs “some” or “total” assistance with toileting, walking, transferring, or feeding, and whether these needs are “frequent” or “infrequent”, and able to be “scheduled” or “predicted”. The intent of the regulation is to allow the identification of situations in which a person’s needs can be met by a live-in aide and still allow the aide to have an uninterrupted five hours for sleeping. The Department is considering changes to the regulations to better achieve this goal. In the meantime, the Department provides the following clarifications:

1. The fact that a person’s needs are predictable does not preclude the receipt of 24-hour split-shift care, if the person has a documented medical need for the tasks to be performed with a frequency that would not allow a live-in aide to perform them and still obtain an uninterrupted five hours of sleep.
2. The need for turning and positioning and/or the need for diaper changes, by themselves, neither preclude nor justify the receipt of 24-hour split-shift care. In order to receive 24-hour split-shift care, the person must have a documented medical need for those tasks to be performed so frequently that a live-in aide cannot provide them and still obtain an uninterrupted five hours of sleep.

3. A person with a documented medical need for turning and positioning may, if otherwise appropriate, qualify for either 24-hour split-shift care or live-in care depending on the frequency at which turning and positioning is required at night, regardless of whether the person has a nighttime need for transferring.

4. When determining whether a person requires 24-hour split-shift care or live-in care, the local professional director must consider whether the physician's order and other required assessments document the following:

- The existence of a medical condition that directly causes the person to need frequent assistance with personal care services tasks during the night;
- The specific task or tasks with which the person requires frequent assistance during the night;
- The frequency at which the person requires assistance with these tasks during the night;
- Whether the person requires similar assistance with these tasks during the daylight hours and, if not, why not;
- The informal supports or formal services that are willing, able and available to provide assistance with the person's nighttime tasks;
- The person's ability to use adaptive or specialized equipment or supplies to meet his or her documented medical need for assistance with nighttime tasks; and whether the person's physician has documented that, due to the person's medical condition, he or she could not safely use the equipment or supplies; and
- Whether a live-in aide would likely be able to obtain an uninterrupted five hours of sleep were live-in services to be authorized.

Administrative Directive 92 ADM-49 clarifies State policy with regard to the requirement that an applicant for/ recipient of Personal Care Services have a stable health condition, and be able to self-direct, and be able to direct a Personal Care Services worker. The ADM reiterates that responsibility for making certain choices can be delegated to a self-directive individual, or to an organization.

In Rodriguez v. City of New York, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 1999), cert. denied 531 U.S. 864, the Plaintiffs were Personal Care Services recipients who alleged that they would be in receipt of inadequate service not meeting legal requirements, without the provision of safety monitoring as an independent task in their Personal Care Services authorizations. The district court had ruled in favor of the Plaintiffs, but the Court of Appeals held that the Agency is not required to provide safety monitoring as an independent Personal Care Services task in evaluating the needs of applicants for and recipients of Personal Care Services. Local Agencies were advised of this decision in GIS message 99/MA/036.

GIS 03 MA/03 was released to clarify and elaborate on the assessment of Personal Care Services pursuant to the Court's ruling in Rodriguez v. Novello and in accordance with existing Department regulations and policies. In relevant portion, this GIS Message states:

Social services districts should authorize assistance with recognized, medically necessary personal care services tasks. As previously advised, social services districts are **NOT** required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However,

districts are reminded that a clear and legitimate distinction exists between “safety monitoring” as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

18 NYCRR 358-5.9(a) provides:

General Information Service message GIS 12 MA/ 026 released by the Department of Health on October 3, 2012, advised that the Department has been directed by the U.S. District Court for the Southern District of New York, in connection with the case of Strouchler v. Shah, to clarify the proper interpretation and application of 18 NYCRR 505.14 with respect to the availability of 24-hour, split-shift personal care services for needs that are predicted and for Medicaid recipients whose only nighttime need is turning and positioning.

It is the Department’s policy that 24-hour split-shift care should be authorized only when a person’s nighttime needs cannot be met by a live-in aide or through either or both of the following: (1)adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, wheelchairs, and insulin pens, when the social services district determines that such equipment or supplies can be provided safely and cost-effectively; and (2)voluntary assistance available from informal caregivers or formal services provided by an entity or agency.

When a person’s nighttime needs cannot be met by the use of adaptive or specialized equipment or supplies or voluntary assistance from informal caregivers or formal services , a determination must be made whether the person needs 24-hour split-shift care (included within the regulatory definition of “continuous personal care services”) or live-in 24-hour personal care services . Under Section 505.14, this depends on whether the person needs “some” or “total” assistance with toileting, walking, transferring, or feeding, and whether these needs are “frequent” or “infrequent”, and able to be “scheduled” or “predicted”.

The intent of the regulation is to allow the identification of situations in which a person’s needs can be met by a live-in aide and still allow the aide to have an uninterrupted five hours for sleeping. The Department is considering changes to the regulations to better achieve this goal. In the meantime, the Department provides the following clarifications:

1. The fact that a person’s needs are predictable does not preclude the receipt of 24-hour split-shift care, if the person has a documented medical need for the tasks to be performed with a frequency that would not allow a live-in aide to perform them and still obtain an uninterrupted five hours of sleep.
2. The need for turning and positioning and/or the need for diaper changes, by themselves, neither preclude nor justify the receipt of 24-hour split shift care. In order to receive 24-hour split-shift care, the person must have a documented medical need for those tasks to be performed so frequently that a live-in aide cannot provide them and still obtain an uninterrupted five hours

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of sleep.

3. A person with a documented medical need for turning and positioning may, if otherwise appropriate, qualify for either 24-hour split-shift care or live-in care depending on the frequency at which turning and positioning is required at night, regardless of whether the person has a nighttime need for transferring.

4. When determining whether a person requires 24-hour split-shift care or live-in care, the local professional director must consider whether the physician's order and other required assessments document the following:

- The existence of a medical condition that directly causes the person to need frequent assistance with personal care services tasks during the night;
- The specific task or tasks with which the person requires frequent assistance during the night;
- The frequency at which the person requires assistance with these tasks during the night;
- Whether the person requires similar assistance with these tasks during the daylight hours and, if not, why not;
- The informal supports or formal services that are willing, able and available to provide assistance with the person's nighttime tasks;
- The person's ability to use adaptive or specialized equipment or supplies to meet his or her documented medical need for assistance with nighttime tasks; and whether the person's physician has documented that, due to the person's medical condition, he or she could not safely use the equipment or supplies; and
- Whether a live-in aide would likely be able to obtain an uninterrupted five hours of sleep were live-in services to be authorized.

General Information Service Message GIS 03/MA/03, released on January 24, 2003 by the New York State Department of Health, reads as follows:

The purpose of this GIS is to clarify and elaborate on the assessment of Personal Care Services pursuant to the Courts ruling in Rodriguez v. Novello and in accordance with existing Department regulations and policies.

Social services districts, including those using locally developed task based assessment (TBA) instruments, must complete a comprehensive assessment of the patients health care needs in order to determine the patients appropriateness for services and the amount, frequency and duration of a service authorization. Department regulations (18 N.Y.C.R.R. 505.14) require both a social and nursing assessment in the Personal Care Services patient assessment process.

The assessment process should evaluate and document when and to what degree the patient requires assistance with personal care services tasks and whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night. The assessment process should also evaluate the availability of informal supports who may be willing and available to provide assistance with needed tasks and whether the patients day or nighttime needs can totally or partially be met through the use of efficiencies and specialized medical equipment

including, but not limited to, commode, urinal, walker, wheelchair, etc.

When the district, in accordance with 505.14 (a)(4), has determined the patient is appropriate for the Personal Care Services Program, a care plan must be developed that meets the patients scheduled and unscheduled day and nighttime personal care needs. In determining the appropriate amount of hours to authorize, the district must review the physicians order and the nursing and social assessments to assure that the authorization and scheduling of hours in combination with any informal support contributions, efficiencies and specialized medical equipment, is sufficient to meet the patient's personal care needs.

Completion of accurate and comprehensive assessments are essential to safe and adequate care plan development and appropriate service authorization. Adherence to Department assessments requirements will help assure patient quality of care and district compliance with the administration of the Personal Care Services Program.

18 NYCRR 358-5.9(a) provides, in relevant part, that at a fair hearing concerning the denial of an application for or the adequacy of medical assistance, the appellant must establish that the agency's denial of assistance or benefits was not correct or that the appellant is eligible for a greater amount of assistance or benefits. Except, where otherwise established by law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of medical assistance, the social services agency must establish that its actions were correct.

## **DISCUSSION**

The Appellant, age 83 and who lives alone, has been enrolled in a Managed Long Term Care Program and has received care and services, including Personal Care Worker ("PCW") services, through a Medicaid Managed Long Term Care Health Plan operated by Centers Plan for Healthy Living ("Centers Plan"), and has been in receipt of a PCW services authorization in the amount of 12 hours per day, 7 days a week. A request was made on behalf of the Appellant, for an increase in PCW services hours to 24 hours, 7 days weekly continuous care by more than one personal care aide "split-shift". By Initial Adverse Determination dated April 10, 2018, Centers Plan advised Appellant of its determination to deny a request for an increase in Personal Care Worker (PCW) services from 12 hours, 7 days per week to 24 hours, 7 days weekly continuous care by more than one personal care aide "split-shift". Appellant's representatives stated that this fair hearing was requested to review Center Plan's determination.

At the hearing, by Waiver of Appearance Evidence packet, Centers Plan submitted into evidence the April 10, 2018 Initial Adverse determination that denied the request for increase from 12 hours, 7 days per week to 24 hours, 7 days weekly continuous care by more than one personal care aide "split-shift". The determination stated in detail that-

"Centers Plan for Healthy Living has determined that coverage for this service will not be increased. This action will take effect on 4/11/2018. The plan is taking this action based on the NYS Department of Health Uniform Assessment System (UAS-NY) and the plan's client tasking tool... A comprehensive NYS Department of Health Uniform Assessment System (UAS-NY)

was conducted on 4/7/2018.”

However, while Centers Plan was duly notified of the time and place of the hearing, Centers Plan produced some evidence at the hearing in support of its determination to deny the request for an increase, but failed to produce a copy of the more recent April 7, 2018 UAS that Centers Plan alleged that it was “...taking this action based on the NYS Department of Health Uniform Assessment System (UAS-NY) and the plan’s tasking tool.” Rather, in support of its Initial Adverse Determination, Centers Plan submitted the out-dated January 26, 2018 Uniform Assessment System New York (UANSY) Assessment (Comprehensive) Report of the Appellant’s personal care needs and not the April 7, 2018 that was referenced as the basis of the denial. Centers Plan did not provide a complete case record necessary to allow comparison of the April 7, 2018 UAS and January 26, 2018 UAS. It is also noted that Centers Plan failed to present any evidence which might establish an improvement in the Appellant’s health and conditions, which would justify the denial.

At the hearing, the Appellant’s representatives testified that Appellant requires assistance with all her activities of daily living including some or total assistance with bathing, toileting, dressing upper and lower body, ambulating, meal preparation, eating and housework. Appellant’s representatives testified that Appellant’s scheduled and unscheduled needs for assistance with toileting, walking, transferring at night, is such that a live-in aide cannot get five hours of uninterrupted sleep. Appellant’s representative further testified that Appellant has Stage 2 Ulcers and needs helps with turning and positioning. Appellant’s representatives stated that Appellant gets up six times or more at night due to her incontinence and need to constantly go to the bathroom. The Appellant is at a risk for falls and fell in October 2017 and was admitted from the hospital to short-term rehab. Lastly, Appellant’s representative testified that Appellant’s daughter, who is her informal care-giver, can no longer provide such care due to her own mental and medical issues. Even without testimony on the toll on Appellant’s daughter’s health issues, as to the issue of family members providing assistance as needed, the regulations are clear that even with Appellants who live with family members, the assistance of family members with personal care services is purely voluntary and not mandatory.

At the hearing, in conjunction with the request for an increase in Appellant’s PCW services hours to 24 hours, 7 days weekly continuous care by more than one personal care aide, Appellant’s representatives submitted as Exhibit #2, a medical letter dated May 7, 2018 from Barbara Hall-Atkins, DNP, NP that reported that Appellant is diagnosed with Rheumatoid Arthritis with deformity in all digits, Hypertension, COPD, Unstageable Sacral Ulcer, Physical deconditioning, Sacropenia, Protein malnutrition, History of consistent falls, Incontinence, neck pain. She ambulates with a walker with slow Ataxic gait. When she was discharged from Upper East Center for Short Term Rehab center in March 2018, there was significant decline in her ability to perform any Activities of Daily Living. Due to deformity in her fingers, patient requires night time care as she has increased risk of falls while going to the bathroom.....”



At a hearing concerning the adequacy of Medical Assistance coverage or services, the Appellant or her representative must establish that the Appellant's medical conditions necessitate frequent assistance with personal care services that must be met with an increase in hours. Documentation and testimony must establish that the Appellant is entirely dependent on caregivers for completion of her activities of daily living (ADLs). In addition, at the hearing the Appellant must establish she is eligible for a greater amount of assistance or benefits. In this present hearing, the credible evidence established that the Appellant suffers from weakness, dizziness, is at a risk for falls, and has a need for assistance with ambulation, toileting and transferring that is unscheduled and unpredictable. Thus, Appellant is eligible for a "span of time" Personal Care Services authorization for such unscheduled and unpredictable needs. As the Appellant's representatives have established their burden of proof, Centers Plan's determination to deny a request for an increase in Personal Care Worker (PCW) services from 12 hours, 7 days per week to 24 hours, 7 days weekly continuous care by more than one personal care aide "split-shift" cannot be sustained.

### **DECISION AND ORDER**

The Managed Long-Term Care Plan's determination to deny a request for an increase in Personal Care Worker (PCW) services from 12 hours, 7 days per week to 24 hours, 7 days weekly continuous care by more than one personal care aide "split-shift" is not correct and is reversed.

1. Centers Plan is directed to increase Appellant's Personal Care Services to the amount of 24 hours, 7 days weekly continuous care by more than one personal care aide "split-shift".

Should Centers Plan need additional information from the Appellant and Appellant's representatives in order to comply with the above directives, it is directed to notify the Appellant and her representatives promptly in writing as to what documentation is needed. If such information is requested, the Appellant and Appellant's representatives must provide it to Centers Plan promptly to facilitate such compliance.

FH# 7741973P

As required by 18 NYCRR 358-6.4, Centers Plan must comply immediately with the directives set forth above.

DATED: Albany, New York  
06/18/2018

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of loops and a horizontal line extending to the right.

Commissioner's Designee