


STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: November 22, 2019

AGENCY: MAP  
FH #: 8067110Y

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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 January 6, 2020, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For Centers Plan for Healthy Living

Deborah Ferguson, Representative

**ISSUE**

Was the Agency's determination on May 1, 2019 to provide the Appellant with Personal Care Service authorization of 7.5 hours a week, 7 days a week, 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 70, who resides with his sister age 80, has been in receipt of a Personal Care Services authorization in the amount 52.50 hours per week, 7 days a week.
2. The Appellant requested an increase to 11 hours a day, 7 days a week.

4. On May 1, 2019, the plan denied the request for an increase in personal care hours, and by notice of final adverse determination dated May 3, 2019, the decision was upheld based upon the Agency's determination that the requested increase was not medically necessary. "The denial for an increase in personal care aide level 2 services was denied because the Appellant does not meet the criteria". Furthermore, the determination noted that there was no change in services since the last assessment justifying an increase.

5. On November 22, 2019, the Appellant requested this fair hearing.

### **APPLICABLE LAW**

At a fair hearing concerning the adequacy of Public Assistance, Medical Assistance, HEAP, SNAP benefits or services, the appellant must establish that the appellant is eligible for a greater amount of assistance or benefits. 18 NYCRR 358-5.9(a).

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

- (2) **Continuous personal care services** means the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

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- (4) **Live-in 24-hour personal care services** means the provision of care by one personal care aide for a patient who, because of the patient's medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

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- (5) 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.

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(b) The authorization for Level I services shall not exceed eight hours per week.

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

(a) Personal care functions include 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) turning and positioning
- (8) preparing meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
- (9) feeding;
- (10) 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;
- (11) providing routine skin care;
- (12) using medical supplies and equipment such as walkers and wheelchairs; and

(13) changing of simple dressings.

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Section 505.14(b) of the Regulations provides that when a social services district receives a request for personal care services, it must determine whether the individual is eligible for Medical Assistance. The initial authorization for services shall be based on :

- a physician's order from the patient's physician based on the patient's current medical status as determined by a medical examination within 30 days of the request for Personal Care Services;
- a social assessment which must include a discussion with the patient to determine perception of his/her circumstances and preferences, an evaluation of the potential contribution of informal caregivers, such as family and friends, to the patient's care, and consideration of the number and kind of informal caregivers available to the patient, ability and motivation of informal caregivers to assist in care, extent of informal caregivers' potential involvement, availability of informal caregivers for future assistance, and acceptability to the patient of the informal caregivers' involvement in his/her care. The social assessment is completed by the Agency. When live-in 24-hour personal care services is indicated, the social assessment shall evaluate whether the patient's home has adequate sleeping accommodations for a personal care aide.
- a nursing assessment. The nursing assessment is completed by a nurse from a certified home health agency or by a nurse employed by the local social services department or by a nurse employed by a voluntary or proprietary agency under contract with the local social services department. The nursing assessment must be completed within 5 working days of the request and must include the following:
  - (1) a review and interpretation of the physician's order;
  - (2) the primary diagnosis code;
  - (3) an evaluation of the functions and tasks required by the patient;
  - (4) the degree of assistance required for each function and task;
  - (5) an evaluation whether adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, can meet the patient's need for assistance with personal care functions, and whether such equipment or supplies can be provided safely and cost-effectively.
  - (6) the development of a plan of care in collaboration with the patient or his/her representative; and

- (7) recommendations for authorization of services.
- an assessment of the patient's appropriateness for hospice services and an assessment of the appropriateness and cost effectiveness of using adaptive or specialized medical equipment or supplies covered by the Medicaid Program including, but not limited to, bedside commodes, urinals, walkers, wheelchairs and insulin pens; and

Where there is a disagreement between the physician's order and the social, nursing and other required assessments, or there is a question about the level and amount of services to be provided, or if the case involves the provision of continuous Personal Care Services or live-in 24-hour personal care services as defined in paragraph (a)(2) and (a)(4), respectively, of this section, an independent medical review of the case must be completed by the local professional director, by a physician designated by the local professional director, or by a physician under contract with the Agency to review personal care services cases, who shall make the final determination about the level and amount of care to be provided.

Section 505.14(a)(3)(iii) of the regulations provides that Personal care services, including continuous personal care services and live-in 24-hour personal care services as defined in paragraphs (2) and (4), respectively, of this subdivision, shall not be authorized to the extent that the patient's need for assistance can be met by the following:

- (1) voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends, or other responsible adult;
- (2) formal services provided or funded by an entity, agency or program other than the medical assistance program; or

GIS 12 MA/026 provides as follows concerning the availability of 24 hour, split-shift personal care services in connection with the case of Strouchler v. Shah:

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

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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.

Reauthorization for personal care services requires similar assessments as for the initial authorization; however a nursing assessment is not required for Level I services if the physician's order indicates that the patient's medical condition is unchanged. Reauthorization of Level II services must include an evaluation of the services provided during the previous authorization period and must include a review of the nursing supervisory reports to assure that the patient's needs have been adequately met during the initial authorization period.

When there is a change in the patient's services needs which results solely from a change in his/her social circumstances, including, but not limited to, loss or withdrawal of support provided by informal caregivers, the social services department must review the social assessment, document the patient's social circumstances and make changes in the authorization as indicated. A new physician's order and nursing assessment is not required.

When there is a change in the patient's services needs which results from a change in his/her mental status including, but not limited to, loss of his/her ability to make judgments, the social services department must review the social assessment, document the changes in the patient's mental status and take appropriate action as indicated.

When there is a change in the patient's services needs which results from a change in his/her medical condition, the social services department must obtain a new physician's order and a new nursing assessment and shall complete a new social assessment. If the patient's medical condition continues to require the provision of personal care services, and the nursing assessment cannot be obtained within five working days of the request from the local social services department, the local department may make changes in the authorization in accordance with the procedures specified in 18 NYCRR 505.14(b)(5)(iv).

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 have 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 Agency's were advised of this decision in GIS message 99/MA/036.

GIS 03 MA/003 provides in part:

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.

## **DISCUSSION**

The Appellant, age 70, who resides with his sister age 80, has been in receipt of a Personal Care Services authorization in the amount 52.50 hours per week, 7 days a week. The Appellant requested an increase to 11 hours a day, 7 days a week. On May 1, 2019, the plan denied the request for an increase in personal care hours, and by notice of final adverse determination dated May 3, 2019, the initial decision was upheld based upon the Agency’s determination that the requested increase was not medically necessary. The denial for an increase in personal care aide level 2 services was denied because the Appellant does not meet the criteria. Furthermore, the determination noted that there was no change in services since the last assessment justifying an increase.

At the hearing the Appellant testified, by speakerphone, that he is ambulatory and can get around by himself. Immediately, it was noted that the Appellant was being prompted not to speak, that the Appellant’s sister continued to speak for the Appellant and stated throughout the hearing that she is weakening physically, and that she cannot care for her brother. In other words, the Appellant’s sister is requesting the increase because she is having physical difficulties rather than there being an actual change in circumstances in the Appellant’s health condition that would warrant an increase. The Agency noted that the sister had made the request and at the hearing, there was no evidence presented to establish the justification for the increase.

At a fair hearing concerning the adequacy of Public Assistance, Medical Assistance, HEAP, SNAP benefits or services, the appellant must establish that the appellant is eligible for a greater amount of assistance or benefits. 18 NYCRR 358-5.9(a). The Appellant, having the burden of proof to establish the increase, did not provide sufficient evidence warranting a reversal of the Agency’s determination to provide 52.50 hours personal care services weekly.



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The Appellant's current services which are being provided for 7.5 hours, 7 days a week, assist the Appellant with bathing, personal hygiene, shopping, meal preparation, medication management, ordinary housework, and limited assistance as needed with transfer and ambulation. The Agency is not required to provide hours for safety monitoring as a standalone function. An increase in hours could only serve as safety monitoring.

The Agency presented an assessment dated April 17, 2019. It was carefully reviewed for any inconsistencies with regards to the Agency's assessment in relation to the Appellant's request for a 77 hour a week increase in Personal Care Service hours. In fact, there is no evidence that there has been a change in circumstances, which would warrant an increase at this time.

The Agency has provided 52.50 hours a week, 7 days a week personal care services. The Personal Care Service authorization is adequate for the Appellant's needs.

It is noted that the Agency has a continuing obligation to monitor the Appellant's social, physical, and mental health circumstances for changes that may warrant an adjustment in the level and amount of personal care service time.

### **DECISION**

The Agency's determination on May 1, 2019 to provide the Appellant with 52.50 hours a week, 7 days a week is correct?

DATED: Albany, New York  
01/14/2020

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to be 'G. White' followed by a large, stylized flourish.

Commissioner's Designee