STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: December 13, 2018
[redacted]
AGENCY: OHC
FH #: 7878670P

In the Matter of the Appeal of

[redacted]

from a determination by the New York City Department of Social Services

DECISION AFTER FAIR HEARING

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 February 28, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

For the Social Services Agency

Nathan Weiner, Fair Hearing Representative

ISSUE

Was the Agency's determination dated December 11, 2018 to deny the Appellant's application for a Personal Care Services, 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 47, and disabled, had been in receipt of a task based Personal Care Services authorization in the amount of 42 hours weekly from a Managed Long-Term Care Plan, Centers Plan for Healthy Living; Appellant's Personal Care Services through Centers Plan for Healthy Living was discontinued effective October 30, 2018 when he was disenrolled from Managed Long-Term Care Plan because plan enrolment conflicts with OPWDD HCBS Waiver enrolment, a determination not an issue at this hearing.

2. On October 18, 2018, the Agency received a medical request for Personal Care Services for Appellant which was completed by the Appellant's physician on October 18, 2018.

3. On November 20, 2018, a nursing assessor completed a Uniform Assessment System evaluation of the Appellant's personal care needs. Among other things, the assessment indicates that the Appellant needs assistance with housekeeping and some assistance with some level II services like transportation.

4. By Notice dated December 11, 2018, the Agency informed the Appellant of the Agency's determination to deny Personal Care Services to the Appellant on the following grounds: "You are non-compliant with medication regimen (insulin and glucose monitoring multiple times a day) Management of insulin is beyond the scope of practice of a home attendant. You require a higher level of care."

5. On December 13, 2018, the Appellant requested this hearing to contest the Agency'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).

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:

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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.

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

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;

Section 505.14(a)(4)(iii) of the regulations provides personal care services shall not be authorized if the patient's need for assistance can be met by either or both of the following:

(a) 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; or

(b) 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 cost-effectively.

Administrative Directive 92 ADM-49 provides in pertinent part:

B. Health and Safety of Recipient

Personal care services may only be authorized when the district reasonably expects that the recipient's health and safety can be maintained in the home. This determination must consider the following:

1. Stability of the Recipient's Medical Condition

The assessing nurse has primary responsibility for determining stability of the recipient's medical condition. The recipient and/or any informal caregiver should be given the opportunity to be involved in this determination. The determination should be based on information included in the nursing assessment and a review of the physician's order. In situations where there is a question about this determination, the assessing nurse may wish to involve the case manager or obtain consultation from the local professional director or his/her designee.

If the recipient's medical condition is not stable, the provision of personal care services is inappropriate unless a determination is made that the provision of personal care services in combination with the intervention of appropriate skilled nursing services, home health aide and/or therapy can adequately meet the recipient's needs.

2. Ability of the Recipient to be Self-Directing

The case manager has primary responsibility for determining the recipient's self-directing capability. The determination should be based on a review of available information in the physician's order and the social and nursing assessments. The case manager must be sensitive to the recipient's habits, factors in the recipient's physical environment and relationships with informal caregivers that might impede the recipient's ability to consistently be self-directing. In situations where there is a question about the final determination, the case manager should consult with the assessing nurse, the local professional director or his/her designee or protective services for adults' case managers. The case manager may also wish to obtain a psychiatric evaluation.

Self-directing means that the recipient has the capability to make choices about activities of daily living, understand the impact of these choices and assume responsibility for the results of these choices.

A non-self-directing recipient lacks the capability to make choices about the activities of daily living, understand the implications of these choices, and assume responsibility for the results of these choices. Characteristics of a non-self-directing recipient include:

a. the recipient may be delusional, disoriented at times, have periods of agitation, or demonstrate other behavior which is inconsistent and unpredictable; or

b. the recipient may have a tendency to wander during the day or night and to endanger his or her physical safety through exposure to hot water, extreme cold, or misuse of equipment or appliances in the home; or

c. the recipient may exhibit other behaviors which are harmful to himself or herself or to others such as hiding medications, taking medications without his or her physician's knowledge, refusing to seek assistance in a medical emergency, or leaving lit cigarettes unattended. The recipient may not understand what to do in an emergency situation or know how to summon emergency assistance.

Personal care services may only be provided to non-self-directing recipients if the responsibility for direction is assumed by another individual or an outside agency and any needed supervision or direction is provided on a part-time or interim basis by that individual or agency.

Responsibility for part-time or interim supervision may be assumed by:

- a self-directing individual who resides in the recipient's household; or
- a legally or non-legally responsible relative, friend, neighbor, or other

informal caregiver who is self-directing; or

- a formal agency such as an area office for the aging; or
- a self-directing individual who lives in another household.

If the individual assuming part-time or interim supervision resides outside of the recipient's home, consideration should be made as to whether that individual has substantial daily contact with the recipient in the recipient's home.

Factors used to determine whether substantial daily contact in the recipient's home is being made include:

- the individual is physically present in the home at times throughout the day or night as necessary to assure the safety of the recipient; and

- any discretionary decisions or choices involved in carrying out the functions and tasks identified in the recipient's plan of care are conveyed to the person providing personal care services.

Substantial daily contact does not mean the individual must be physically present in the home for a specified amount of time. The frequency of contact needed to assure a safe situation and provide discretionary direction should be based on each recipient's case situation as reflected in the social and nursing assessments and in the recipient's plan of care.

Supervision and direction of non-self-directing recipients is not an appropriate role for individuals providing personal care services. Such individuals can perform the functions or tasks specified in the recipient's plan of care as instructed by another person. They can also observe and monitor the recipient for possible changes in his/her functioning. However, when changes are noted, the individual is responsible for reporting his/her observations to the appropriate professional for review and decisions about the recipient's plan of care.

If the recipient has no individual or outside formal agency willing to assume responsibility for his/her supervision and direction, a referral should be made to the protective services for adults program for a protective services assessment. Denial or termination of personal care services may be required if the recipient's health and safety cannot be assured by involvement of other individuals, outside formal agencies or the protective services for adults (PSA) program....

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 patient's health care needs in order to determine the patient's 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 patient's 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.

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.

General Information Services Message GIS 97 MA/033 was released on November 26, 1997. In relevant portion, the GIS message states:

> Remember that the contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. A district may choose to implement so-called "statements of understanding" to reflect a family member's or friend's voluntary agreement to provide hours of care to a recipient whom the district has determined is medically eligible for split shift or live-in services. (See 95 LCM-76, section III, issued July 18, 1995, for a description of statements of understanding).

DISCUSSION

The hearing record establishes that Appellant had previously been in receipt of a task based Personal Care Services authorization in the amount of 42 hours weekly from a Managed Long-Term Care Plan, Centers Plan for Healthy Living; Appellant's Personal Care Services through Centers Plan for Healthy Living was discontinued effective October 30, 2018 when he was disenrolled from Managed Long-Term Care Plan because plan enrolment conflicts with OPWDD HCBS Waiver enrolment, a determination not an issue at this hearing. The record further establishes that on October 18, 2018, the Agency received a medical request for Personal Care Services for Appellant which was completed by the Appellant's physician. Appellant's physician reported in part that Appellant suffers from diabetes mellitus and is insulin dependent. He also suffers from cerebral palsy and is legally blind. Appellant's physician also reported that Appellant "need HAA to assist w/meds, for count of pills and time."

By Notice dated December 11, 2018, the Agency informed the Appellant of the Agency's determination to deny Personal Care Services to the Appellant on the following grounds: "You are non-compliant with medication regimen (insulin and glucose monitoring multiple times a day) Management of insulin is beyond the scope of practice of a home attendant. You require a higher level of care."

The Agency was duly notified of the time and place of the hearing. However, while the Agency produced some evidence at the hearing in support of its determination, it failed to produce sufficient evidence to support its determination dated December 11, 2018 to deny Personal Care Services to the Appellant on the grounds that Appellant requires higher level of care. The Agency failed to establish Appellant's alleged non-compliance with medication regimen and glucose monitoring multiple times a day. While it is true that management of insulin is beyond the scope of practice of a home attendant, the Agency failed to support its finding that appellant requires or relies on the assistance a home attendant for his insulin and glucose monitoring.

On the contrary, the Appellant credibly testified that he has been in receipt of Personal Care Services in the past through a Managed Long-Term Plan, and he has never relied on or have his insulin injected by a home attendant. The Appellant credibly testified that he injects his own insulin by himself and he has never had an issue with that in the past and he monitors his own glucose without the assistance of home attendant. Appellant's testimony in this regard was found credible because it was detailed and concise. The hearing record includes some documents from Appellant's former Managed Long-term Care Plan, and nowhere was the question of glucose or insulin monitoring was ever raised as constituting a problem. Besides, as stated above, the Agency submitted to evidence to support this allegation which was used as a reason to deny the Appellant's application.

The Agency obtained a Uniform Assessment System evaluation of the Appellant's personal care needs, dated November 20, 2018. Among other things, the assessment indicates that the Appellant needs assistance with housekeeping and some assistance with some level II services, which includes preparing meals. It need be stated that part of level II services by the home

attendant includes, 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." This should not be confused with the requirement of higher level of care where the home attendant helps the patient to inject, for example, insulin, as alleged in this case. It is also noteworthy to state that on page 21 of the Uniform Assessment System, the accessing nurse answered "NO" to the question whether the person is "medically complex and skilled nursing services and monitoring required," which contradicts the Agency's reason for denial in this case.

The substantial weight of the credible evidence developed in this fair hearing establishes that the Appellant needs assistance with level I and some level II services. In determining what hours would be more appropriate, consideration is given to the totality of the evidence obtained at this hearing. Therefore, the Agency should authorize Appellant to receive Personal Care Services in the amount of 21 hours weekly (3 hours daily, 7 days weekly).

DECISION AND ORDER

The Agency's dated December 11, 2018 to deny the Appellant's application for a Personal Care Services, was not correct and is reversed.

1. The Agency is directed to accept Appellant's application for Personal Care Services and authorize the amount of 21 hours weekly, (3 hours daily, 7 days weekly).

2. The Agency is directed to inform the Appellant and Appellant's representative in writing, when the Agency has complied with this fair hearing decision.

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

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

DATED: Albany, New York
03/27/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee