STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: April 2, 2019
[redacted]
AGENCY: MAP
FH #: 7938022L

In the Matter of the Appeal of [redacted]	:	**DECISION AFTER FAIR HEARING**
from a determination by the New York City Department of Social Services	:	

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 April 24, 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

Agency appearance waived by the Office of Administrative Hearings

For the Appellant's Managed Long Term Care Plan (Centers Plan)

Debra Ferguson, Centers Plan Representative

ISSUE

Was Centers Plan's December 24, 2018 determination to deny the Appellant's request for an increase of 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 90) has been in receipt of a Medical Assistance authorization and is enrolled in and receiving services from a Managed Long Term Care Plan, Centers Plan for Health Living (Centers Plan).

2. The Appellant had been receiving Personal Care Services in the amount of 8.5 hours daily, seven days weekly.

3. The Appellant requested an increase of Personal Care Services to 12 hours daily, seven days weekly.

4. Centers Plan obtained a Uniform Assessment System report from a registered nurse on November 30, 2018, which indicates that the Appellant is in need of assistance with, among other things, ambulation, transferring, toileting, bed positioning and feeding.

5. Centers Plan had previously obtained a Uniform Assessment System report from a registered nurse on June 18, 2018, which indicates that the Appellant was in need of assistance with, among other things, ambulation, transferring, toileting, bed positioning and feeding.

6. By Notice dated December 17, 2018, Centers Plan denied the Appellant's request, and informed the Appellant of its determination to continue to provide the Appellant with Personal Care Services in the amount of 8.5 hours daily, seven days weekly.

7. The Appellant requested an internal appeal, and by a Notice of Final Adverse Determination dated December 24, 2018, the Agency denied the Appellant's internal appeal.

8. On April 2, 2019, the Appellant requested this fair hearing.

APPLICABLE LAW

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.

18 NYCRR 505.14(a)(2) provides a new definition of "Continuous Personal Care Services" ("Split-Shift Care") as follows: 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.

18 NYCRR 505.14(a)(4) provides a new definition of "Live-in 24-Hour Personal Care Services" as follows: 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.

GIS 12 MA/026 entitled "Availability of 24-Hour Split-Shift Personal Care Services" provides, in part, the intent of 18 NYCRR 505.14 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.

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 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 System message GIS 97 MA 033 notified local districts as follows:

The purpose of this GIS is to provide further instructions regarding the Mayer v. Wing court case, which applies to social services districts' reductions or discontinuations of personal care services. [Mayer v. Wing, 922 F. Supp. 902 (S.D.N.Y., 1996)]. The Mayer case is now final, and the Department is issuing these additional instructions to comply with the court's final order in this case.

Districts were first advised of the Mayer case in May, 1996. (Please refer to GIS 96 MA/019, issued May 28, 1996.) As described in that GIS message, the Mayer case prohibits social services districts from using task-based assessment plans ("TBA plans") to reduce the hours of any personal care services recipient whom the district has determined needs 24 hour care, including continuous 24 hour services ("split-shift"), 24 hour live-in services ("live-in") or the equivalent provided by informal or formal supports. This GIS message identifies the policies and procedures districts must follow in order to comply with this particular provision of the Mayer case.

This particular provision of the Mayer case applies only when the district has first determined that the MA recipient is medically eligible for split-shift or live-in services. To determine whether the recipient is medically eligible for split-shift services or live-in services, the district must continue to follow existing Department regulations and policies. As is currently required, the district must assure that the nursing and social assessments fully document and support the determination that the recipient is, or is not, medically eligible for split shift or live-in services.

When the district has determined that the MA recipient is medically eligible for split-shift or live-in services, it must next determine the availability of informal supports such as family members or friends and formal supports such as Protective Services for Adults, a certified home health agency or another agency or entity. This requirement is no different from current practice. And, as under current practice, the district must assure that the nursing and social assessments fully document and support its determination that the recipient does, or does not, have informal or formal supports that are willing and able to provide hours of care.

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.)

Once the district has determined that the recipient is medically eligible for split-shift or live-in services and determined whether the recipient has informal or formal supports that are willing and able to provide hours of care, the district can assure that it is complying with the Mayer case by following the appropriate guidelines set forth below:

1.Recipient is medically eligible for split-shift services but has no informal or formal supports:

The district should authorize 24 hour split shift services for this recipient if the recipient otherwise meets the fiscal assessment requirements. The district must not use a TBA plan to reduce this recipient's personal care services.

2. Recipient is medically eligible for split-shift services and has informal or formal supports:

The district should authorize services in an amount that is less than 24 hour split-shift services if the recipient otherwise meets the fiscal assessment requirements. The amount that is authorized, when combined with the amount that informal or formal supports are willing and able to provide, would equal 24 hours. The district must not use a TBA plan to reduce this recipient's services because the recipient is receiving the "equivalent" of split-shift services: part of the services are funded by the MA program and part of the services are provided by the informal or formal supports.

3. Recipient is medically eligible for live-in services but has no informal or formal supports:

The district should authorize 24 hour live-in services for this recipient if the recipient otherwise meets the fiscal assessment requirements. The district must not use a TBA plan to reduce this recipient's personal care services.

4. Recipient is medically eligible for live-in services and has formal or informal supports:

The district should authorize services in an amount that is less than 24 hour live-in services if the recipient otherwise meets the fiscal assessment requirements. The amount that is authorized, when combined with the amount that the informal or formal supports are willing and able to provide, would equal 24 hours. The district must not use a TBA plan to reduce this recipient's services because the recipient is receiving the "equivalent" of live-in services: part of the services are funded by the MA program and part of the services are provided by the informal or formal supports.

Important Additional Information on TBA Plans:

Until notified otherwise by the Department, the following also apply to the use of TBA plans:

1. A district cannot use a TBA plan unless the TBA plan was already in use on March 14, 1996, or the district had the Department's approval as of that date to implement a TBA plan. This complies with the temporary restraining order in Dowd v. Bane, which the Department notified districts of in a previous GIS message, 96 MA/013, issued April 4, 1996.

2. Districts are not required to include safety monitoring as an independent task on their TBA forms. The Department recently obtained a stay of the August 21, 1997 federal court order that had required safety monitoring to be included as an independent TBA task. [See GIS 97 MA/26, issued November 6, 1997, informing districts of the stay of the order in Rodriguez v. DeBuono (S.D.N.Y., 1997).]

DISCUSSION

The record of the hearing reveals that the Appellant has been in receipt of a Medical Assistance authorization and is enrolled in and receiving services from a Managed Long Term Care Plan, Centers Plan. The Appellant has been receiving Personal Care Services in the amount of 8.5 hours daily, seven days weekly. The Appellant requested an increase of Personal Care Services to 12 hours daily, seven days weekly. By Notice dated December 17, 2018, Centers Plan denied the Appellant's request. The Appellant requested an internal appeal, and by a Notice of Final Adverse Determination dated December 24, 2018, the Agency denied the Appellant's internal appeal.

At the hearing, Centers Plan produced a Uniform Assessment System assessment dated November 30, 2018 which indicated that the Appellant needs assistance with transferring and locomotion, toileting, bed positioning and feeding, which are unscheduled needs requiring span of time care. It is also noted that Centers Plan had previously obtained a Uniform Assessment System report from a registered nurse on June 18, 2018, which indicates that the Appellant was in need of maximal assistance with, among other things, ambulation, transferring, toileting, bed positioning and feeding. The record of the hearing reveals that Centers Plan for Healthy Living's own assessments made clear that the Appellant had unscheduled needs since June of 2018. Nonetheless, the Managed Long Term Care Plan continued to provide the Appellant with Personal Care Services in accordance with a task based assessment.

At the hearing the Appellant's Daughter gave credible and uncontroverted testimony that she had informed Centers Plan for Healthy Living on numerous occasions that she was unable to meet the Appellant's night time needs due to her own illnesses. The Appellant's Daughter stated that when she informed the Appellant's care manager of this fact she was told that in that circumstance the Appellant should be admitted to a nursing facility. The Appellant's Daughter's testimony in this regard was credible based upon the Appellant's Daughter's demeanor and answers to questions.

The credible evidence at the hearing was that the Appellant is in need of assistance with transferring and ambulation, toileting, bed positioning and feeding (among other things), and is therefore in need of 24 hour care. Furthermore, the credible evidence further establishes that both assessors independently stated that the Appellant has a need for positioning in bed. As

standard protocol for positioning is once every two hours, it is plain that a home attendant could not meet the Appellant's positioning needs while obtaining, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep. The Managed Long Term Care Plan's own evidence clearly establishes that the Appellant is appropriate for continuous care Personal Care Services.

18 NYCRR 505.14(a)(2) provides a new definition of "Continuous Personal Care Services" ("Split-Shift Care") as follows: 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.

While the Appellant requested an authorization of 12 hours daily, seven days weekly Personal Care Services, the credible evidence was both that such an authorization is inadequate to meet the Appellant's actual needs, and that the Managed Long Term Care Plan has failed to act appropriately with regard to the Appellant's Personal Care needs since at least June of 2018. Further, there was credible evidence that the Appellant's Daughter and Power of Attorney was misinformed by the Managed Long Term Care Plan as to the availability of night time care in a fashion which necessarily suggests an element of threat or coercion on the part of the Plan. As noted in the above cited law and regulation, the contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. In light of the facts and circumstances of this case, the interests of justice require that an authorization of Continuous Personal Care Service ("Split Shift" care) be directed.

DECISION AND ORDER

The Appellant's Managed Long Term Care Plan's determination to partially deny the Appellant's request for an increase of Personal Care Services weekly is not correct and is reversed.

1. The Managed Long Term Care Plan is directed to authorize Continuous Personal Care Service ("Split Shift" care) to the Appellant.

Should the Managed Long Term Care Plan need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant and the Appellant's Representative promptly in writing as to what documentation is needed. If such information is required, the Appellant or the Appellant's Representative must provide it to the Managed Long Term Care Plan promptly to facilitate such compliance.

As required by Section 358-6.4 of the Regulations, the Agency must comply immediately with the directives set forth above.

FH# 7938022L

DATED: Albany, New York
04/30/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee