

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: September 24, 2019

AGENCY: MAP

FH #: 8033748P

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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 October 23, 2019, 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 Health Living, by: Debra Ferguson, Fair Hearing Representative

**ISSUE**

Was the determination, dated September 30, 2019, by the Managed Long-Term Care Plan to deny Appellant's request to increase Personal Care Services from 56 hours weekly, 8 hours daily, seven days weekly to 24-hour Live-In 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 , resides with her son, age , and has been in receipt of Personal Care Services provided through a partially capitated Medicaid Managed Long-Term Care Plan, Centers Plan for Healthy Living, hereinafter, the "MLTCP."

2. On September 17, 2019, Appellant and or her provider requested an increase in Personal Care Services from 56 hours weekly, 8 hours daily, 7 days weekly to 24-hour Live-In Personal Care Services.

3. By Initial Adverse Determination Denial Notice, dated September 30, 2019, hereinafter, the “Determination,” the MLTCP determined to deny the Appellant’s request for the increase in Personal Care Services.

4. Appellant did not request an internal appeal of the Determination through the MLTCP.

5. On September 24, 2019, this fair hearing was requested. At the fair hearing, the issue was clarified.

### **APPLICABLE LAW**

New York State Medicaid Managed Care Enrollee Right to Fair Hearing and Aid Continuing for Plan Service Authorization Determinations December 15, 2017 states in pertinent part:

Federal Medicaid managed care rules published in May 6, 2016 amended procedures for service authorization, appeals, fair hearings, and aid continuing. Medicaid managed care plans, including mainstream, HIV Special Needs Plans and Health and Recovery Plans, must continue to comply with requirements in NYS statute, NYS regulation, and the Medicaid Managed Care Model Contract where not superseded by federal rule, including but not limited to the provision of evidence packets, appearance at state fair hearings, and compliance with the Office of Administrative Hearings directives and decisions.

Right to Fair Hearing regarding plan services authorization determinations:

1) 42 CFR §§438.402(c)(1)(i) and 438.408(f)(1) establish that enrollees may request a state fair hearing after receiving an appeal resolution (Final Adverse Determination) that an adverse benefit determination (Initial Adverse Determination) has been upheld.

2) 42 CFR §§438.402(c)(1)(i)(A), 438.408(c)(3), and 438.408(f)(1)(i) provide that an enrollee may be deemed to have exhausted a plan’s appeals process and may request a state fair hearing where notice and timeframe requirements under 42 CFR 438.408 have not been met. Deemed exhaustion applies when:

- an enrollee requests a Plan Appeal, verbally or in writing, and does not receive an appeal resolution notice or extension notice from the plan;
- an enrollee requests a Plan Appeal, verbally or in writing, and does not receive an appeal resolution notice or extension notice from the plan within State-specified timeframes; or
- a plan’s appeal resolution or extension notice does not meet noticing requirements identified in 42 CFR §438.408.

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3) 42 CFR §438.408(f)(2) provides the enrollee no less than 120 days from the date of the adverse appeal resolution (Final Adverse Determination) to request a state fair hearing.

4) Pursuant to 42 CFR §438.424(a), if OAH determines to reverse the MMC decision, and the disputed services were not provided while the appeal and hearing were pending, the plan must authorize or provide the disputed services promptly and as expeditiously as the enrollee's condition requires but no later than 72 hours from the date the plan receives the OAH fair hearing decision.

## **DISCUSSION**

The record establishes that The Appellant, age 53, resides with her son, age 31, and has been in receipt of Personal Care Services provided through the MLTCP.

The record establishes that on September 17, 2019, Appellant and or her provider requested an increase in Personal Care Services from 56 hours weekly, 8 hours daily, 7 days weekly to 24-hour Live-In Personal Care Services.

The record establishes that by the Determination, the MLTCP determined to deny the Appellant's request for the increase in Personal Care Services.

The record establishes that the Appellant did not request an internal appeal of the Determination through the MLTCP and that on September 24, 2019, this fair hearing was requested.

The Determination states in pertinent part on page 3 that if the Appellant does not agree with the Determination that she (or someone on her behalf) may request a "Plan Appeal" within 60 days of the date of the Determination. The Determination also states, on page 5, that the Appellant has the right to request a "State Fair Hearing" **after receipt of a Final Determination** (emphasis provided) and that she has 120 days from the date of the Final Determination to request a Fair Hearing.

At the instant fair hearing, the Appellant's representative's testimony established that neither the Appellant nor anyone on her behalf requested an appeal of the Determination through the MLTCP before requesting the Fair Hearing. The Appellant's representative contended further that he did not appeal the Determination because of the time involved, his work schedule and the care he was providing for the Appellant.

As the MLTCP's internal appeal process has not been exhausted, accordingly, the Commissioner of the New York State Department of Health lacks jurisdiction to review the MLTCP's Determination.

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The Appellants representative is to note that pages 3 – 7 of the notice dated September 30, 2019 describes the steps that must be taken before a “Fair Hearing” can be requested, as well as the deadlines by which such actions must occur. Also attached was a request form (page 7) which could be submitted.

Should there be future or additional requests for changes, without the completion of those steps, the Commissioner does not have jurisdiction to review the Agency determination.

**DECISION**

The Commissioner of the New York State Department of Health lacks jurisdiction to review the MLTCP’s determination dated September 30, 2019.

DATED: Albany, New York  
12/16/2019

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

H Cooper Gregory

Commissioner's Designee