STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: June 29, 2018
[redacted]
AGENCY: MAP
FH #: 7783232N

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 July 31, 2018, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

For the Medicaid Managed Long Term Care Plan

Agency appearance waived by the Office of Administrative Hearings

ISSUE

Was the Medicaid Managed Long Term Care Plan's June 18, 2018 determination to partially deny the Appellant's request for an increase in the Appellant's Personal Care Services Authorization, from 45.5 hours per week (6.5 hours per day x 7 days per week) to 84 hours per week (12 hours per day x 7 days per 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 82, has been in receipt of Medicaid benefits provided through a Medicaid Managed Long Term Care Plan, Centers Plan for Healthy Living (hereinafter "Plan").

2. The Appellant is currently authorized to receive 52.5 hours per week (7.5 hours per day x 7 days per week) in Personal Care Services.

3. The Appellant's diagnosed health conditions include abdominal distension, abdominal hernia, abnormalities of gait and mobility, anxiety disorder, constipation, diarrhea, dementia, dizziness and giddiness, essential primary hypertension, fatigue, fecal urgency, hallucinations, history of falls, insomnia, irritable bowel syndrome, major depressive disorder, malignant neoplasm of colon, muscle weakness (generalized), other specified diseases of pancreas, pain, panic disorder, shortness of breath, spondylosis, and urinary incontinence.

4. On January 23, 2018, a registered nursing assessor conducted a Uniform Assessment System ("UAS") assessment of the Appellant's personal care needs.

5. On June 5, 2018, a registered nursing assessor conducted a Uniform Assessment System ("UAS") assessment of the Appellant's personal care needs.

6. On June 4, 2018, the Appellant requested an increase in the Appellant's Personal Care Services Authorization, from 45.5 hours per week (6.5 hours per day x 7 days per week) to 84 hours per week (12 hours per day x 7 days per week).

7. By Initial Adverse Determination, dated June 18, 2018, the Plan determined to partially deny the Appellant's daughter's request for an increase in the Appellant's Personal Care Services Authorization. The Plan determined to approve an increase to 52.5 hours per week (7.5 hours per day x 7 days per week), not 84 hours per week (12 hours per day x 7 days per week).

8. On June 21, 2018, the Appellant appealed the Plan's June 18, 2018 determination.

9. By Final Adverse Determination, dated June 25, 2018, the Plan upheld its June 18, 2018 determination.

10. On June 29, 2018, the Appellant's daughter requested this fair hearing to contest the Plan's determination to partially deny the request for an increase in the Appellant's Personal Care Services Authorization.

APPLICABLE LAW

Section 358-5.9 of the Regulations provides that, at a fair hearing concerning the denial of an application for or the adequacy of Public Assistance, HEAP, SNAP benefits, Medical Assistance or Services, 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.

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 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 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 438.404(b) of 42 CFR Subpart F provides in part:

(b) Content of notice. The notice must explain the following:
(1) The action the MCO or PIHP or its contractor has taken or intends to take;
(2) The reasons for the action...

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, as specified in 18 NYCRR §§ 505.14(a)(5)(i)(a) and 505.14(a)(5)(ii)(a). Such services must be essential to the maintenance of the patient's health and safety in his or her own home, as determined by the social services district in accordance with Section 505.14; ordered by the attending physician; based on an assessment of the patient's needs and of the appropriateness and cost-effectiveness of services specified in 18 NYCRR § 505.14(b)(3)(iv); provided by a qualified person in accordance with a plan of care; and supervised by a registered professional nurse.

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

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

In <u>Rodriguez v. City of New York,</u> 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.

Pursuant to GIS 03 MA/003, task based assessments must be developed which meet the <u>scheduled and unscheduled day and nighttime needs</u> of recipients of Personal Care

Services, <u>the span of time in which those needs arise</u>. This GIS was promulgated to clarify and elaborate on the assessment of Personal Care Services **pursuant to the Court's ruling in <u>Rodriguez v. Novello</u> and in accordance with existing Department regulations and policies**. 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.

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**.**

Completion of accurate and comprehensive assessments are essential to safe and adequate care Medical 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.

State of New York, Department of Social Services, Memorandum DSS-524EL, dated May 1, 1991, Russell J. Hanks, Policy Clarifications, states, in part: In some cases, an Appellant will provide evidence for the first time during a hearing[,] which was not provided to the social services district at the time the original determination was made. Where the evidence demonstrates that a determination in the Appellant's favor is now appropriate, the decision should indicate that the determination of the district was correct when it was made but that new evidence now requires a different result.

DISCUSSION

The uncontroverted evidence in this case establishes that the Appellant, age 82, has been in receipt of Medicaid benefits provided through a Medicaid Managed Long Term Care Plan and is currently authorized to receive 52.5 hours per week (7.5 hours per day x 7 days per week) in Personal Care Services (hereinafter "PCS"). The Appellant's diagnosed health conditions include abdominal distension, abdominal hernia, abnormalities of gait and mobility, anxiety disorder, constipation, diarrhea, dementia, dizziness and giddiness, essential primary hypertension, fatigue, fecal urgency, hallucinations, history of falls, insomnia, irritable bowel syndrome, major depressive disorder, malignant neoplasm of colon, muscle weakness (generalized), other specified diseases of pancreas, pain, panic disorder, shortness of breath, spondylosis, and urinary incontinence.

The evidence further establishes that on June 4, 2018, the Appellant requested an increase in the Appellant's Personal Care Services Authorization, from 45.5 hours per week (6.5 hours

per day x 7 days per week) to 84 hours per week (12 hours per day x 7 days per week). By Initial Adverse Determination, dated June 18, 2018, the Plan determined to partially deny the Appellant's daughter's request for an increase in the Appellant's Personal Care Services Authorization. The Plan determined to approve an increase to 52.5 hours per week (7.5 hours per day x 7 days per week), not 84 hours per week (12 hours per day x 7 days per week). The Plan's notice stated, in pertinent part:

> …A comparison of the UAS-NY assessments completed on 01/23/2018 and 06/05/2018 showed that [the Appellant has] demonstrated some changes in [the Appellant's] abilities to perform [the Appellant's] Activities of Daily Living (ADLs) and no changes in [the Appellant's] Instrumental Activities of Daily Living (IADLs)…The NYS Department of Health Uniform Assessment System (UAS-NY) conducted on 06/05/2018 and the [P]lan's client tasking tool showed that [the Appellant] need[s] PCA services seven and a half (7.5) hours per day, seven (7) days per week (Totaling fifty-two and a half [52.5] hours per week) of PCA services to complete the above mentioned tasks…This is a sufficient amount of time to complete the above mentioned tasks and adequately meet your needs…

The evidence further establishes that on June 21, 2018, the Appellant appealed the Plan's June 18, 2018 determination. By Final Adverse Determination, dated June 25, 2018, the Plan upheld its June 18, 2018 determination.

At the hearing, the Appellant's daughter, who appeared on behalf of the Appellant, testified that the Appellant's Personal Care Aide (hereinafter "PCA") arrives at 9:00 AM and leaves at 4:30 PM each day, which leaves the Appellant without care between the hours of 4:30 PM and 8:00 PM (the Appellant's bedtime) and without care in the morning before the PCA arrives. The Appellant's daughter testified that she requested an increase so that the Appellant would have PCS from 8:00 AM for breakfast and medications through 8:00 PM, when the Appellant needs assistance with evening medications, which are to be taken with dinner. The Appellant's daughter contends that the Appellant cannot manage these tasks on her own as she cannot prepare food and does not remember to take her medications, even though they are pre-poured. Review of the Plan's June 5, 2018 UAS assessment supports the Appellant's daughter's testimony, as it provides that the Appellant is: totally dependent on the assistance of others for meal preparation (performance and capacity); requires maximal assistance with managing medications (performance and capacity), bathing, dressing lower body, and toilet use; and requires extensive assistance with personal hygiene, dressing upper body, walking, locomotion, toilet transfer, and bed mobility. The June 5, 2018 UAS assessment also provides that the Appellant is required to take 23 medications daily (6 in the evening).

The record has been considered. The evidence establishes that the Appellant, an 82-year-old who suffers from multiple medical conditions, does require the assistance of PCA between the hours of 8:00 AM and 8:00 PM, the span of time in which these needs arise. This is because the Appellant needs assistance with ADLs throughout the day and takes a combination of 23 medications daily (6 of which are to be taken at night). Pursuant to GIS 03 MA/003, the Plan must develop a care plan that meets the Appellant's scheduled and unscheduled day and

nighttime needs during the span of time in which those needs arise. Additionally, the Plan is reminded that a clear and legitimate distinction exists between "safety monitoring" as a non-required independent stand-alone function while no Level II PCS task is being provided, and the appropriate monitoring of a patient who suffers from cognitive impairment, while providing assistance with the performance of Level II PCS tasks, such as transferring, toileting, or walking, to assure the task is being safely completed.

DECISION AND ORDER

The Plan's determination to partially deny the Appellant's request for an increase in the Appellant's Personal Care Services Authorization, from 45.5 hours per week (6.5 hours per day x 7 days per week) to 84 hours per week (12 hours per day x 7 days per week), is not correct and is reversed.

1. The Plan is directed to immediately provide the Appellant with a Personal Care Services Authorization in the amount of 84 hours per week (12 hours per day x 7 days per week).

2. The Plan is directed to notify the Appellant, in writing, of the Plan's determination to increase the Appellant's Personal Care Services Authorization from 52.5 hours per week (7.5 hours per day x 7 days per week) to 84 hours per week (12 hours per day x 7 days per week).

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

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

DATED: Albany, New York
09/07/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee