


STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: September 27, 2018

AGENCY: MAP  
FH #: 7833342H

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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 November 8, 2018, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



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 for Healthy Living)

Julia Rolffot, Centers Plan for Healthy Living Representative

**ISSUE**

Was the Managed Long Term Care Plan's determination dated September 27, 2018, to deny the Appellant's request for an increase of Personal Care Services to the amount of Continuous Personal Care Services (Split-Shift Care) correct?

**FACT FINDING**

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 84) has been in receipt of a Personal Care Services authorization in accordance with a task-based assessment in the amount of 56 hours weekly.
2. On April 21, 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 positioning in bed.
3. By notice dated September 18, 2018, the Managed Long Term Care Plan's determined to deny the Appellant's request for an increased Personal Care Services authorization to the amount of Continuous Personal Care Services (Split-Shift Care).
4. The Appellant requested an internal appeal of Centers Plan for Healthy Living's September 18, 2018 determination, and by notice dated September 27, 2018, Centers Plan for Healthy Living denied the Appellant's internal appeal.
5. On September 27, 2018, this hearing was requested.

### **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).

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.

## **DISCUSSION**

Centers Plan for Healthy Living, although duly notified of the time and place of this fair hearing, appeared without a full and complete case record. In particular, at the hearing the Centers Plan for Healthy Living Representative conceded that there was a Uniform Assessment System report from September 2018 which was used by Centers Plan for Healthy Living in making its determination, but a copy of this document was not submitted into evidence at the hearing.

As an initial matter, it is noted that in its Notices and at the hearing, Centers Plan for Healthy Living claimed that the Appellant’s initial request for an increase of Personal Care Services was only for 24 hour live in care, rather than for continuous personal care services. At the hearing (and in the request for the present hearing) the Appellant’s Representative has asserted that the Appellant actually requested an increase to continuous personal care services. It was undisputed that the request was made by telephone. The Appellant’s uncontroverted and credible testimony at the hearing was that she had made the request by telephone and requested continuous personal care services for the Appellant. The Appellant’s daughter’s testimony in this regard was credible based upon her demeanor and answers to questions.

The credible evidence establishes that the Appellant has been in receipt of a Personal Care Services authorization in accordance with a task-based assessment in the amount of 56 hours weekly. The credible evidence, in the form of a Uniform Assessment System assessment submitted by the Managed Long Term Care Plan establishes that on April 21, 2018 a nursing assessor completed Uniform Assessment System evaluation of the Appellant’s personal care needs. The credible evidence further establishes that the nurse assessor found that the Appellant

has needs for assistance with, among other things, ambulation, toileting, transferring, feeding and 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.

At the hearing, the Appellant's Representative contended that the Appellant has unmet nighttime needs that include, but are not limited to, assistance with toileting three or more times nightly, at unpredictable times, and assistance with positioning.

The evidence has been considered. The Appellant's Representative's testimony that the Appellant needs frequent hands-on assistance at night with toileting and positioning was found to be credible as it was supported by the weight of the evidence presented at the hearing. Furthermore, based on a consideration of such a need for frequent hands-on assistance at night with toileting and positioning, the credible evidence establishes that the Appellant needs assistance at night with toileting and positioning 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.

The credible evidence establishes that the Appellant is entitled to a Personal Care Services authorization in the amount of Continuous Personal Care Services (Split-Shift Care).

### **DECISION AND ORDER**

The Managed Long Term Care Plan's determination dated September 27, 2018, to deny the Appellant's request for an increase of Personal Care Services to the amount of Continuous Personal Care Services (Split-Shift Care) is not correct and is reversed.

1. The Managed Long Term Care Plan is directed to provide the Appellant with an increased Personal Care Services authorization in the amount of Continuous Personal Care Services (Split-Shift Care).

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

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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 Managed Long Term Care Plan must comply immediately with the directives set forth above.

DATED: Albany, New York  
11/14/2018

NEW YORK STATE DEPARTMENT  
OF HEALTH

By

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Commissioner's Designee